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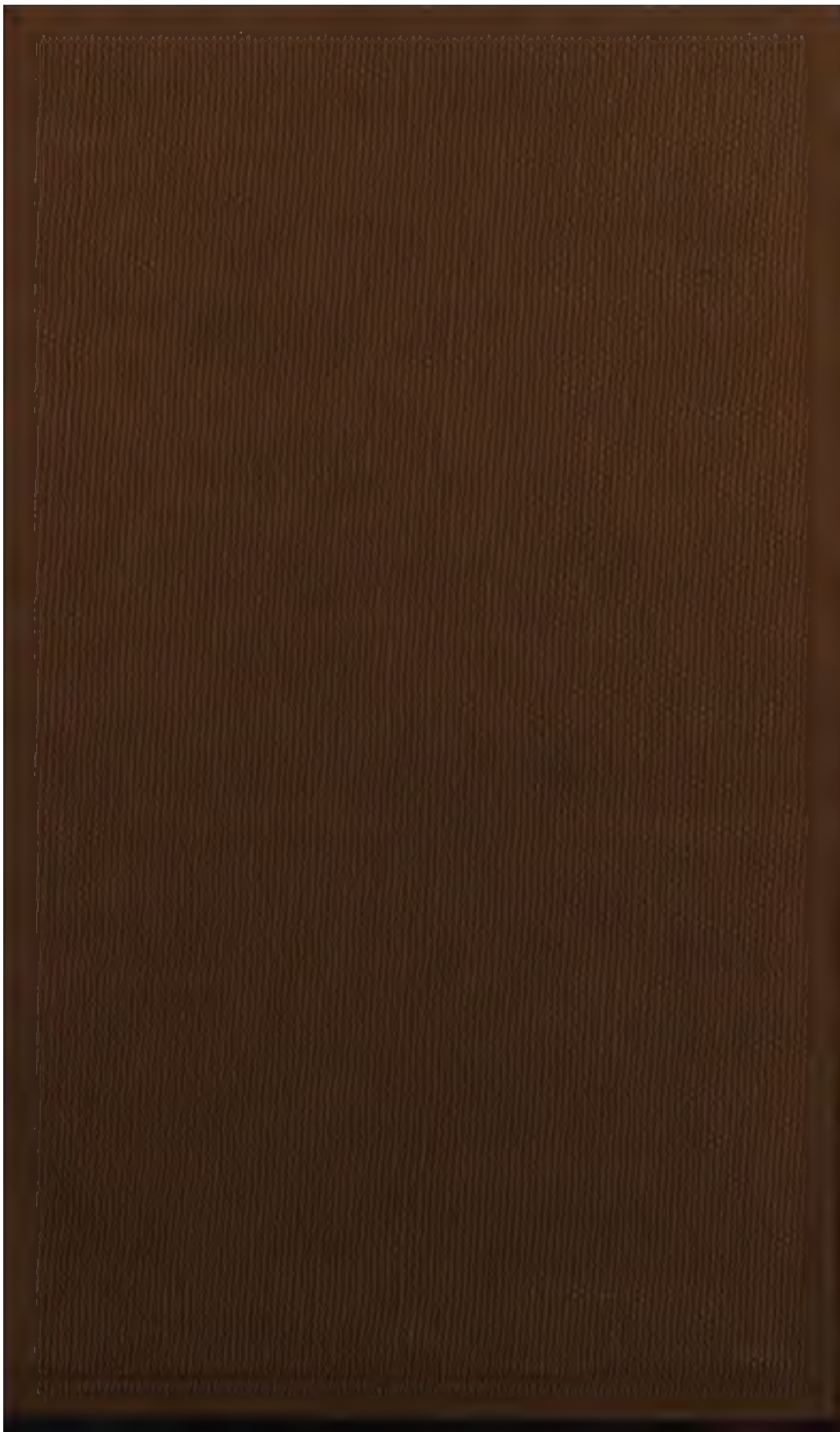
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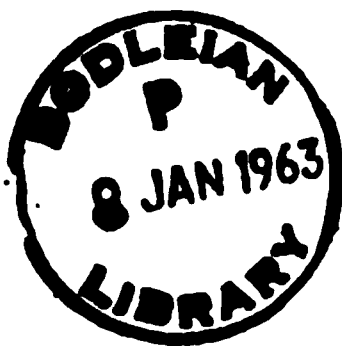
REPORTS
OF
CASES ARGUED AND ADJUDGED
IN THE
Supreme Court of Florida,
AT
TERMS HELD IN 1867-'8-'9.

BY JOHN B. GALBRAITH and A. R. MEEK, Reporters.

VOLUME XII.

TALLAHASSEE.
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1869.



JUDGES OF THE SUPREME COURT.

DURING THE PERIOD OF THESE REPORTS.

TERMS 1867-'8.

HON. CHARLES H. DUPONT, CHIEF-JUSTICE.

HON. SAMUEL J. DOUGLAS, } **ASSOCIATE-JUSTICES.**
HON. JAMES M. BAKER, }

JOHN GALBRAITH, ATTORNEY-GENERAL.

TERMS IN OCTOBER, 1868, AND IN 1869.

HON. E. M. RANDALL, CHIEF-JUSTICE.

HON. O. B. HART, } **ASSOCIATE-JUSTICES.**
HON. J. D. WESTCOTT, JR., }

A. R. MEEK, ATTORNEY-GENERAL.

JUDGES OF THE CIRCUIT COURTS.

DURING THE PERIOD OF THESE REPORTS.

TERMS 1867-'8.

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HON. B. F. PUTNAM, JUDGE EASTERN CIRCUIT.

HON. THOS. T. LONG, JUDGE SUWANNEE CIRCUIT.

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Judgeship of Southern Circuit vacant because of the death
of **HON. JAMES GETTIS.**

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HON. HOMER G. PLANTZ, JUDGE FIRST JUDICIAL DISTRICT.

HON. P. W. WHITE, JUDGE SECOND JUDICIAL DISTRICT.

HON. THOS. T. LONG, JUDGE THIRD JUDICIAL DISTRICT.

HON. ALVA A. KNIGHT, JUDGE FOURTH JUDICIAL DISTRICT.

HON. JESSE H. GOSS, JUDGE FIFTH JUDICIAL DISTRICT.

HON. JAS. T. MAGBEE, JUDGE SIXTH JUDICIAL DISTRICT.

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NOTE.—The Head Notes in each case were prepared by the Judge who delivered the opinion, as required by law.

Decisions
OF THE
Supreme Court of Florida,
AT TERMS HELD IN 1867-'8.

DAVID S. WALKER, APPELLANT, vs. JAMES H. GATLIN,
APPELLEE.

The warranty contained in a bill of sale given for a negro, that he was to be a "slave for life," is not broken by the subsequent act of the Government which abolished in the Southern States the institution of negro slavery.

Appeal from Leon Circuit Court.

This case was decided at Tallahassee.

A statement of the case is contained in the opinion of the Court.

R. B. Hilton and *A. L. Woodward* for Appellant.

J. D. Westcott for Appellee.

A covenant that a slave is a slave for life, is repealed by the act of a convention of the people of a State, abolishing slavery, and the destruction or deprivation of property by such action is no breach of the covenant—5th Cowen, 538, and cases there cited.

The covenant does not extend to the acts of the government—it is restricted to parties, not strangers.

A covenant for quiet enjoyment does not extend to a

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forcible eviction by a stranger claiming no right through covenantor.

The covenant is good also, for at the time he was a slave for life.

A covenant for quiet possession is *subject* to the right of eminent domain.—7 Mass.; 325.

The covenant has reference only to the *status* of the property at the date of the contract, and if there was no defect in the title then, no supervening event can affect the rights of the parties.

M. D. Papy on the same side.

DUPONT, C. J., delivered the opinion of the Court.

The appellant, together with one Joseph H. Alston, was the joint maker of a promissory note, dated February, 1861, and payable on or before the first day of October, 1862. This note was given to secure a part of the price agreed to be paid by the said Alston to the appellee for a negro. The appellee executed to Alston a bill of sale for the property, containing a clause of warranty, that the negro was “a slave for life.” The note not having been paid at maturity, suit was instituted and a judgment obtained thereon at the March Term, 1864, of the Leon Circuit Court.

Subsequently, to-wit: on the 28th day of March, A. D. 1866, the appellant filed his bill for an injunction to restrain the enforcement of the judgment at law, alleging as ground of equity “that said Gatlin warranted said slave to be a slave for life; that said slave is still living; that since the making of said note, and rendition of said judgment, the Government of the United States has destroyed slavery in this State, and the people of this State, in convention assembled, have declared in their Constitution that all the inhabitants of this State, without distinction of color, are free, and that slavery shall not in future exist in this State.” He

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further alleges that "he could not plead the above defence in bar of the judgment, because slavery had not been abolished in this State, as above stated, at the date of the judgment, and therefore he has been guilty of no laches. The injunction was granted in accordance with the prayer of the bill, but on the coming in of the answer, and upon motion, the same was dissolved. It is from the order of the Chancellor dissolving the injunction that this appeal is taken.

It will be perceived that the point presented for the adjudication of the Court has arisen out of the recent abolition of the institution of negro slavery, as it heretofore existed in this State. It might be a question more curious than profitable, under existing circumstances, whether the act of emancipation owes its operative effect to the proclamation of the President of the United States, the action of the State Convention, or the amendment to the Constitution of the United States. It is sufficient for this argument, that the status of the negro, the sale and purchase of whom constitutes the subject matter of the controversy, has been altered from that of slavery to freedom since the date of the contract. That change is not controverted; and, indeed, as a "fact accomplished," (whatever may be thought of its legality,) admits of no controversy.

The terms of the warranty under consideration was, during the existence of negro slavery, of very frequent occurrence in all bills of sale given for slaves; and we are now called on to decide whether such a covenant, made at a period when the legal existence of that institution was recognized, both by the Federal and State Constitutions, is to be deemed to have been broken by the act abolishing that institution. In the consideration of this question, we are measurably without precedent, and certainly without anything that is entitled to the character of authority. The question is of such recent origin, that the very few adjudications which have been made, cannot as yet be recognized

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as of binding force under the maxim of *stare decisis*. They are suggestive, and to that extent ought to be looked to with all proper respect, and may be consulted with profit. Before, however, making reference to the decided cases, which have fallen under our observation, we prefer to fortify the conclusion at which we have arrived, by the application of well recognized principles of interpretation, to the contract entered into by the parties, and by an argument drawn from a case of close analogy.

This covenant or warranty partakes of all the essential elements of an ordinary contract between the vendor and vendee of the slave, and as a contract, is subject to the same rules of interpretation that would be applied in other cases. Amongst the most prominent of these rules is that one which looks to the intention and understanding of the parties. To arrive with proximate certainty at that intention it is expedient to consider the nature of the contract, the position of the parties, and the political circumstances that surrounded them.

Here was a contract or agreement for the sale and purchase of a negro slave, evidenced by the execution, delivery and acceptance of a conveyance in writing, containing a stipulation or covenant, that the negro so agreed to be sold, was to remain a "slave for life." The parties, vendor and vendee, occupied a position of perfect equality, and were dealing with each other at arms length. The one agreed to transfer to the other his title in the property, and by a clause of special warranty, to guarantee its *political status*. The other, in consideration of such transfer and guaranty, agreed to pay a stipulated price, on or before a stipulated day, and evidenced the same by the execution and delivery of the promissory note, upon which the judgment was obtained that is now sought to be enjoined. At the date of this agreement, as well as at the date when the judgment was rendered, it is not pretended but that the entire transaction

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was perfectly legal under the then existing constitution and laws of the State. Having thus grouped into one view the nature of this contract, the position of the parties, and the political circumstances that surrounded them, we are now the better prepared to answer the question touching the intention and understanding of the parties.

It will be noted that the date of this contract is only about one month subsequent to the date of the "Ordinance of Secession," which placed this State by the side of her sisters, South Carolina and Mississippi, in their assertion of the right to exist as "independent sovereignties." Can it for a moment be imagined, that at that interesting period, when all hearts were aglow with buoyant hopes of national independence, it ever entered into the mind of either party that the warranty given in the bill of sale was *intended* to provide against the possible contingency, which has since happened—the defeat and overthrow of the Confederate Government, and the consequent abolition of the institution of negro slavery? Such an assumption is repelled by the well known character of the parties to this contract, and we are irresistibly forced to the conclusion that the insertion of the warranty contained in the bill of sale was understood and intended to have reference exclusively to the status of the property as it existed at the date of the contract, and not to be affected by any supervening event that might transpire and operate to alter that status. As well might it be contended that if this negro had escaped from the possession and control of the vendee, and taken up his abode in one of the so-called free States, where in consequence of the condition of public sentiment, it was impracticable to reclaim him, the warranty would have been thereby broken. In that case as in this, the negro would have been in life, and yet the right of property as nugatory and worthless as under the operation of the act of emancipation. Or had he been captured during the progress of hostilities between the

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Confederate and United States, and transported beyond the territorial limits and jurisdiction of the former, would it be seriously insisted that such capture and transportation to a place where he would be protected in the enjoyment of his personal freedom would amount to a breach of the warranty? It may, with some degree of plausibility be replied, that his escape or capture would not affect the *legal* status of the negro, but only operate to deprive the vendee of the ability to control or use him as property. That may be so, and yet *practically* he would be as much a free man, and that during life, as he now is under the operation of the act of emancipation. If it be admitted, as it undoubtedly will be, that in these supposititious cases the warranty would be held not to have been broken, we can perceive no good reason why a different conclusion should be arrived at in the case before us. The fact of *intention* is as patent in the one as in the other. In either case, the *loss of property* is effected, not by the act of the vendor, but by an act entirely beyond his control, and for the consequences of which he ought not to be held responsible.

In announcing the foregoing conclusion, we are not to be understood as holding that it was, or was not, in the power of the parties to give and accept a warranty against the very contingency which has unfortunately happened. Whether an individual can legally enter into an agreement to insure against the future act of the government, to which he owes allegiance, is a question which, upon general principles of national law, may admit of some doubt. But, be that as it may, if such had been the intention and understanding of the parties to this contract, they would doubtless have been more explicit in making known that intention than by adopting a stereotyped formula, which had been in use under an entirely different condition of things for more than two hundred years. Such an intention, clearly manifested by the terms used, would have imparted to the instrument rather

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the character of a "policy of insurance" than that of an ordinary *warranty* of title and of continuous possession.

Thus subjecting the question to the test of *intention*, the Court is clearly of opinion that there has been no breach of the warranty contained in the bill of sale, and that consequently, the injunction which had been granted to stay the execution a law, was properly dissolved.

But if any further argument be required to sustain and fortify our conclusion, we invoke with confidence the doctrine which prevails in the case of real estate, where interpretation is given to the analogous covenant for "quiet enjoyment." The doctrine in that case is well settled that such covenant will not be held to be broken by any action of the supreme authority of the State, and it is based upon the established right of "eminent domain," as defined in the books. This right finds its sanction in the idea that the ultimate title to all property resides in the government, and that its enjoyment by the citizen is held subservient to that limitation and condition.

Chancellor Walworth, commenting upon this subject, says: "Notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property, remains in the government or in the aggregate body of the people in their sovereign capacity, and they have a right to resume the possession of the property in the manner directed by the laws, and constitution of the State, whenever the public interest requires it. This right of resumption may be exercised, not only where the safety, but also where the interests or even the expediency of the State is concerned."—3 Paige R., 73; vide also 6 Cowan R., 538.

Mr. Justice Daniel, in delivering the opinion in the case of "The West River Bridge Company vs. Dix., et al.," decided in the Supreme Court of the United States, says: "Under every established government, the tenure of property is derived mediately or immediately from the sovereign power

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of the political body organized in such mode or exerted in such way as the community or State may have thought proper to ordain. It can rest on no other foundation, can have no other guarantee. It is owing to these characteristics only, in the original nature of tenure, that appeals can be made to the laws, either for the protection or assertion of the rights of property. Upon any other hypothesis the law of property would be simply the law of force. Now it is undeniable that the investment of property in the citizen by government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the State or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfill it. But in all contracts, whether made between the State and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, and of the community in which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all—are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made subservient to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain.”—6 How. S. C. R., 532.

Applying the doctrine here so luminously set forth to the case before us, it must be manifest that the vendor and vendee—the one giving and the other accepting the warranty, that the negro was “to be a slave for life,” contracted with each other in the full understanding that their contract was subservient to any change in the political status of the negro contracted for, which the supreme authority of the State might at any time see proper to decree. The spirit of

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the contract had reference exclusively to the then status of the title, and there was no *insurance* or guaranty against the exercise of this right of sovereignty residing in the State.

In discussing the right of "eminent domain," we know that it is usual to refer its exercise to realty rather than to personalty; but this is so only because the necessity for the application is more frequent in the one case than in the other. If, in the exercise of this right, the supreme authority may control the status of real property, there is no conceivable reason why its existence may not reach personalty, subject, of course, to the limitations and conditions contained in the fundamental law of the State. This right of sovereignty has been applied to and exercised over the negro involved in this controversy, so as to alter his political status, as it existed at the date of the contract, from that of slavery to freedom, and we do not think that the vendor should be held responsible for the act; it is one over which he could exercise no control.

It is gratifying to us to know that the conclusion arrived at in this case is sustained by two recent decisions of the Supreme Court of Georgia, where the same question was solemnly adjudicated. We refer to the case of "Hand vs. Armstrong," and "Bass vs. Ware," decided at the June Term, 1866.

This being the first case in which the point presented by the record has arisen in this Court, we have given to its investigation more than usual attention, and are well satisfied that the conclusion at which we have arrived is in perfect accordance with both the law and equity of the case.

Let the order of the Chancellor dissolving the injunction be affirmed with costs.

Whitner vs. Hamlin—Argument of Counsel.

JOSEPH N. WHITNER, PLAINTIFF IN ERROR, vs. NATHANIEL
HAMLIN, DEFENDANT IN ERROR.

1. After a juror has been regularly sworn and empanelled, the fact that he was a juror previously in the same cause when there was a mistrial, because the jury could not agree, does not authorize or require his being set aside in the second trial, when it does not appear that the juror is prejudiced, partial or biased in regard to the matters or questions submitted to the jury, and this in the judgment and discretion of the Court.
2. Judges are not authorized or required to give charges or instructions to juries on abstract questions of law not pertinent to the case before the Court, and having no relation thereto.
3. Where a sealed verdict (by consent) has been rendered by a jury neither party has the right to demand that the jury be polled. This may be done, however, at the discretion of the Judge, whose duty it is to see that no wrong or injustice is done to parties, and whose discretion in such cases is not matter for review by this Court.

This case was decided at Tallahassee.

The opinion of the Court contains a statement of the facts of the case to which reference is made.

A. J. Peeler for Plaintiff.

1st. Assignment. This juror, E. B. Clark, should have been excused and another sworn in his stead. He acted as an honest juror should have done in acquainting the Court and counsel as soon as he discovered it that he had sat on a jury in the same cause on its previous trial. He felt that he was not impartial, and desired to be excused, and the counsel for Defendant moved the Court to excuse him. No injury could have resulted to either party from his being excused. Had this not been discovered until after the verdict, it would have furnished good cause for a new trial; vide *McKinly vs. Smith*, Hard. Rep., 167; *Herndon vs. Bradshaw*, 4 Bibb., 45; *Vance vs. Haslitt*, ib., 191. If this furnishes good cause to disturb the verdict and grant new

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trial, certainly it ought to have been good ground to excuse a juror before verdict. The defendant could have taken no advantage in the excuse of such juror, for he was moving and consenting to it. Jurors should be free from all exceptions and wholly disinterested.—2 Johns. 194. If at that stage of the cause the juror could not be discharged and another sworn in his stead, as in the case of a juror who is ill, still the Court should have set aside the verdict and awarded a venire *de novo*.—Dorcy vs. Hobson, 6 Taunt., 460, Eng. Com. L. Rep., Vol. 11. It may be said that the first jury did not render a verdict, that they failed to agree. This would seem to furnish stronger proof of the juror being partial or prejudiced, for there was, necessarily, irreconcilable differences among the first jury, showing that their conclusions were fixed and unyielding.

2d. Assignment. The instruction should have been given, because it is but the repetition of a Rule of Evidence which has never been controverted and which rests on substantial justice, to-wit: that secondary evidence shall be excluded unless the best evidence cannot be obtained.

3d Assignment. The right in either party in a civil cause to have the jury polled before recording their verdict, and this whether the verdict be sealed or oral, is unquestionable. The following cases are in point: 6 Johns. 68; 7 John. 32; Fox against Smith, 3 Cowan, 23; Johnson vs. Howe *et al.*, 2 Gilman, 343; Rig vs. Cook, 4 ib., 336. In these cases the doctrine of discretion in the Judge was fully discussed and overruled; but if this Court should deem it a matter of discretion, certainly the facts apparent from the record that the case is one of no little difficulty as to the complicated and conflicting character of the testimony, and that one of the jurors, for reasons satisfactory to himself, asked to be excused, and that the Court denied both the request and motion of defendant's counsel, it is due to the

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defendant that he should at least been permitted to know that the verdict rendered was the verdict of each of the jurors.

M. D. Papy and R. B. Hilton for Defendant:

M. D. PAPY and R. B. HILTON, for Appellee, cite the following authorities:

Commonwealth vs. Roby, 12 Pick.; Fellows Case, 5 Greenleaf, 333; School Dist. vs. Bragdon, 3 Foster, 507; Hancock vs. Wymans, 20 Texas, 320; Craig vs. Elliott, 4 Bibb, 271.

DOUGLAS, J., delivered the opinion of the Court.

This cause comes here on a writ of error from the Circuit Court of Leon county.

On the trial in the Court below, the defendant moved the Court for instructions to the jury, which were refused, and thereupon a bill of exceptions was tendered, which was signed and sealed by the Court, and made a part of the record.

The plaintiff in error now assigns in this Court the following errors, as reasons why the judgment of the Court below should be reversed:

1st. That the Court erred in refusing to excuse and set aside E. B. Clark, one of the jurors, from serving in said cause, said Clark having been a juror in the same cause when tried at a previous term, and in overruling defendant's motion to excuse said Clark and permit another juror to be sworn in its stead.

The record shows, that upon the reading of a portion of the written evidence offered by the plaintiff, and before the same had been fully read in evidence, one of the jurors (E. B. Clark) who had been sworn and empanelled in the case, arose in his place in the jury box, and stated to the

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Court that from the reading of said evidence, he discovered that he had been a juror in said cause, when at a previous term of the Court there had been a mis-trial because the jury could not agree, and that he desired to be excused from serving as a juror in the case.

The defendant then moved the Court to excuse the juror Clark, and to swear another juror in his place; which motion was refused by the Court.

It is now insisted on behalf of the plaintiff in error, that the juror Clark should have been set aside, and another juror sworn in his place, and several authorities have been cited in support of this position. Upon a careful examination of the authorities cited, it will be found that they do not support the position contended for. The utmost extent to which the authorities go is this: that if a verdict has been rendered by a juror who is prejudiced, or who is so partial and biased in his feelings that he is not in a state of mind to render a fair and impartial verdict, in such cases, upon proof of the fact, it would be the right and duty of the Judge, before whom the trial was had, to award a venire *de novo*.

Of the cases cited in the argument, that of Herndon vs. Bradshaw, 4 Bibb Rep. 45, most resembles the case now under consideration, and yet they are unlike in a most material point. In that case the juror had served on a former jury in the same case, and a verdict had been rendered. In the case now under consideration, the juror Clark, had been sworn and empanelled on a former jury in the same case, but the jury did not agree to a verdict, and were discharged by the Court. There is no evidence in the record to show that the juror, Clark, had ever made up and formed an opinion on the merits of the case, or that he had any prejudice or bias against the defendant, or was other than a fair and impartial juror. In making known to the Court that he had formerly been empanelled and sworn in the case, he did

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not say or intimate that his mind had been or then was made up on the merits of the case, or that it was not in a condition to do impartial justice between the parties. Had the jurymen, Clark, declared that he was prejudiced, or unable to do equal and impartial justice between the parties, it would have been the duty of the Judge to set him aside, and to have substituted another in his stead; and a refusal to do so would have been good ground for a motion for a venire *de novo*.

It is well settled, that if a juror is challenged "*propter affectum*," for suspicion of bias or partiality, it must be done before he is sworn;—after he has been selected, empanelled and sworn, it is too late to raise the objection.—See Buller's Nisi Prius, 307.

The practice in the Circuit Courts of this State is, for the jurors in civil cases, when called to be sworn, to be offered to the parties to be accepted by them. That is the proper time to object to any juror, if any cause of objection exists. If the privilege is not then exercised, and the juror is selected and sworn, the Court would not have the right to set him aside afterwards, unless it could be shown that there are grave reasons for doing so, and such as would go to show, that from bias or prejudice, a fair and impartial verdict could not be obtained from the juror objected to. In this case, it was in the power of the parties, by diligence, to have ascertained that the juror, Clark, had been empanelled and sworn on the former trial, and their failure to do so did not furnish sufficient ground for the interposition of the Court, or of this Court.

2d. The second error assigned is: The Court erred in refusing to give the instruction asked by the defendant to the effect, that evidence of the contents of books shown to be in existence is not admissible, but that the books must be produced.

We do not see from the record any thing calling for the

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instruction asked, and Judges are not authorized or required to give charges or instructions to juries on abstract questions of law not pertinent to the case before the Court and having no relation thereto.

There is nothing going to show that the contents of books not produced, was testified to by any of the witnesses. In his statement the witness, W. K. Beard, certifies "that two casks of bacon were received by the steamship *Magnolia* from New Orleans, on or about the 29th of November, 1859, shipped by N. Hamlin, per account of Mr. Thomas Barnard, 'marked W. & F.' and sent by Rail Road to station No. 3, Pensacola & Georgia Rail Road, on account of Messrs. Whitner & Footman, as appears by books of original entry kept by Beard & Denham, of which firm I was a partner, and to the best of my knowledge no complaint was ever made by said Whitner & Footman that said bacon was not received by them, but Mr. Whitner did and does, and has within the last two weeks admitted that said bacon was received; but claims that he paid for it;—of this payment I know nothing, as it did not pertain to my business."

It will be seen from this statement of the witness, Beard, that the allusion and reference to the books of the firm of Beard & Denham, was not for the purpose of proving the delivery of the bacon, the point on which his testimony was taken; or to prove any other substantial fact in the case. The delivery of the bacon is proved, according to the evidence of this witness, by the admissions of the defendant, Whitner, the strongest proof that could be given against the defendant.

From this view of the case, on the evidence set forth in the bill of exceptions, it will be seen that the instruction asked was not pertinent to the case, or called for by the evidence given in the trial; and the Judge in the Court below properly refused to give it to the jury. .

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In the case of Dibble vs. Truluck, decided at the last term of this Court, the Court said: "Courts sit to decide causes, and not to moot points of law, and the Court cannot in the progress of a trial be required to give opinions or instructions upon general and abstract propositions of law. The Court may and should refuse to give an opinion or instructions on such points, and if the refusal to give the instructions asked is appealed from, the appellate Court will not interfere, unless it can be shown that the instruction asked was warranted by the testimony, and ought to have been given.

The third error assigned is: The Court erred in denying and refusing to allow the jury to be polled on the request and motion of the defendant before the verdict was recorded.

The bill of exceptions in this cause shows, that while the jury were in the jury room consulting on their verdict, and the Court being about to take a recess for dinner, it was agreed by the counsel of the parties that the jury might, during the recess, bring in a sealed verdict, which was done. On the Court resuming its session, the jury came into the jury box and presented their verdict, sealed in an envelope. The defendant's counsel requested the Judge to have the jury polled; which was refused and the verdict was then recorded?

The question presented for the consideration of the Court is: If it is the right of a party when a sealed verdict has been returned to have the jury polled; or is it a matter resting within the sound discretion of the Judge, under all the circumstances in the case.

It has been a mooted question whether under any circumstances, after a jury have agreed on their verdict, it is the right of parties to have them polled, that is, to enquire of each juror if the verdict returned into court is at the time their verdict. Authorities are to be found for the ex-

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ercise of this right, while other authorities deny this privilege as a right, and refer the power to the exercise of a sound discretion on the part of the Judge who presides at the trial. The decision of this question is not necessary to the proper adjudication of the case now before the Court, and is not raised by the record and we shall not, therefore, undertake to decide on which side of this question is the weight of authority. The question presented by the record is not as to the right of parties to poll the jury in all cases, but whether after the jury has delivered a sealed verdict by the consent of parties, either party may demand as a right that the jury shall be polled. We are of the opinion that no such right exists, and that such applications must be addressed to the sound discretion of the Judge, whose duty it is to see that no wrong or injustice is done to parties, and whose discretion in such cases is not a matter for review by this Court.

In the case of Hancock vs. Winans, the right of parties to poll the jury, after a sealed verdict had been rendered by consent, was examined at much length by the Supreme Court of Texas, and the Court decided that no such right existed, but it was a matter within the sound discretion of the Court. See 20 Texas Rep., 320.

The judgment of the Court below is affirmed, with costs.

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**THE PENSACOLA & GEORGIA RAILROAD COMPANY AND THE
ATLANTIC & GULF CENTRAL RAILROAD COMPANY, APPEL-
LANTS, VS. SPRATT & CALLAHAN, APPELLEES.**

1. The object and purpose of an injunction is to preserve and keep things in the same state or condition, and to restrain an act which, if done, would be contrary to equity and good conscience, and is the appropriate relief when the remedy at law is subsequent to the injury, and the effect cannot be adequately compensated.
2. To support a motion for an injunction, the bill should set forth a case of probable right, and a probable danger that the right will be defeated without the interposition of the Court. It interposes between the complainant and the injury he fears or seeks to avoid. If the injury be already done, the writ of injunction can have no application, for it cannot be applied correctively so as to remove it.
3. Under the prayer for "general relief," such relief may be afforded to the complainants as is *consistent* with the case made in the bill, provided the relief granted does not conflict with that specifically prayed.
4. A Court will not suffer a defendant to be taken by surprise and permit a plaintiff to neglect and pass over the special prayer he has made for relief and take another decree, even though it be according to the case made by his bill.
5. The plaintiff cannot desert specific relief prayed, and under the general prayer ask special relief of another description. Under the general prayer the plaintiff shall have such other relief as is *consistent* with the case made and the special prayer, and no more.
6. The exception to this general rule is, when there is an *obstruction* to the Court's granting the particular relief prayed. In such cases the plaintiff may take a different decree under the general prayer.
7. The insolvency of the debtor is never a sufficient reason of itself for the exercise of the extraordinary power of the Court by way of injunction. There must be some other equitable ground combined with insolvency.
8. To authorize the interposition of the Court to stay waste it must appear to the satisfaction of the Court that, unless its aid is given, irreparable injury will be done to the complainant or his property.
9. The existence of a "lien" on behalf of the complainant, will not entitle him to an injunction to restrain the defendant in the free use and enjoyment of his property.

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10. In cases of lien, to entitle a complainant to the aid of an injunction, he must show that the free enjoyment of the property by defendant, will, in all probability, tend to its injury or destruction to an extent that will impair its value as a security for his demand and peril its ultimate payment.

Appeal from Columbia Circuit Court.

This case was decided at Tallahassee.

A statement of the case is contained in the opinion of the Court.

J. M. B. Lovell, for Appellants:

I. Every essential fact necessary to obtain the relief granted to the complainant must be stated in the bill, that the defendant may properly prepare his defence. The decree rendered in this cause by the Judge below, is not sustained by any of the allegations of the bill of complainants, or by any proofs in the cause; and is founded on facts not put in issue by the pleadings, and for that cause the judgment of the court below should be reversed. Story's Eq. Plead., §257 and 257 a; Banks vs. Carneal, et al., 10 Wheat., 181, 189; Crockett vs. Lee, 7 Wheat., 522; Stuart vs. Mech. & Farmer's Bank, 19 Johns., 496; Robson vs. Hartwell and wife, 6 Geo., 596. Even an admission in the answer will not cure the want of the charge in the bill. Story's Eq. Plead., §263, 264.

II. An injunction will not be granted under the prayer for general relief unless it is agreeable to the case made by the bill; and the complainant cannot desert the specific relief prayed for in the bill, and under the prayer for general relief obtain other specific relief inconsistent with the prayer in the bill for specific relief. Story's Eq. Plead., §40, 41, 42 and 43; Marine & Fire Insurance Bank vs. Early et al., R. M. Charlton's Rep., 280; Hiern vs. Mill, 13 Vesey, 119; Wilkin vs. Wilkin, 1 Johns., Ch.

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115, 117; Butler et al. vs. Durham, 2 Kelley, Geo. R., 420; English vs. Foxhall, 2 Peters, Curtis' condensed vol. 8, 222.

III. But it may be said that it lies in the discretion of the Chancellor to grant the injunction or not. What does this term discretion of the Chancellor mean? It is not the arbitrary will of the Judge, but it is a sound and reasonable discretion, based upon established precedents and regulated upon grounds which make it judicial. 1 Fonblanque's Eq., 4th Am. Ed., 10, 20, 21, 39 and 40; Seymour vs. Delancy, 3d Cowan, 505; 2d Story Eq. Juris., §769; Mathews vs. Terwillinger, 3 Barb., S. C. R., 55; Rex. Wilkes, Burrows' Rep. 2,539.

But it may be urged that the decree granted in this cause, is such a decree as the Chancellor might reasonably grant to prevent waste, although not directly sustained by the allegations of the bill. This view of the case leads to the inquiry, whether, under the allegations and statements of the Bill and answers, any such decree could be properly made under any aspect of the cause at bar. I contend that it could not for the reasons:

I. The injunction should not be granted on this bill, as it no where appears on the face of the bill that the running of the cars of defendant over the road will so impair its value that the property will not be sufficient to respond to any judgment the complainants may obtain; this allegation should appear with certainty. Story's Eq. Plead., Sect. 240, 241, 242, 248, 249, 250. The answer in this case alleges exactly the contrary, even if the fact was in the bill directly alleged.

II. The complainants have no lien, legal or equitable, upon the railroad of defendants. First: Because it appears by the bill that complainants contracted with the Confederate States of America, and contracting with a *Government*, could not obtain a lien against the *Government*; a lien presumes a legal right with a legal and judicial remedy. Gov-

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ernment cannot be sued, there can be no lien against Government, and ergo no lien against the defendants holding under Government. Second: Because railway contractors do not take or have mechanic's lien on road for their work. 1st Redfield on Railways, page 444, section XX; Dunn vs. North Missouri R. R., 24 Mo., 493; Blair vs. Corby, 29 Mo. R., 480, 486; Lien Law, Thomp. Dig., 408.

III. Injunction should not be granted to restrain a mere trespass where the injury is not irreparable. Jerome vs. Ross, 7 Johns., ch. 315, opinion of Court p. 321, 322, 330, et seq. to 346; Stevens vs. Beekman, 1 John. ch., 318; Eden on Injunction, 229, et seq., 2 American Edition; 3d Eng. R. R. cases, p. 253; 1 Page's Chan., 17. Nor where the right is doubtful. Hart vs. Mayor, &c., 3d Page, 212, 214; North River St. Boat Co. vs. Livingston, 3 Cowan, 713; Snowden vs. Noah, 1 Hopkins, ch. 347, 353; Bond et al. vs. Little, 10th Geo. 400; Waterman's Eden on Inj. p. 1, chap. 1, note 1, vol. 1. And if the bill alleges that the *defendant claims title adverse to the complainant*, the *complainant states himself out of Court*. Eden on Inj., 2d Am. Ed., 229 to 235; Storm vs. Mann, 4 Johns., ch. 21; Story Eq. Juris., sec. 918; Pillsworth vs. Hopton, 6 Vesey, 51.

IV. An injunction will never be granted to stay waste when defendant is in possession, claiming and holding adversely. Nevitt vs. Gillspie, 1 Howard Miss., 108; Storm vs. Mann, 4 Johns., ch. 21; Pillsworth vs. Hopton, 6 Vesey, 51; Lansing vs. North River Steamboat Co., 7 Johns. ch. 162.

V. Injunction will not be granted where the complainant is guilty of Laches. Storys Eq. Juris., sec. 959a; Southard et al. vs. Morris Canal Co., Saxton, ch. N. J. Rept., 518.

VI. Where the right of the complainant depends on the legal effect of a covenant, no injunction will be granted until the legal effect of the covenant be settled, (legality of

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contract here denied) and where the loss on the one side can be ascertained, but on the other could not, if the injunction issued, the court will dissolve the injunction and put the parties on terms. In this case the complainants have given no bond of indemnity for granting the injunction. *Rigly vs. The Great Western R. R.*, 4th Eng. R. R. cases, top page 365, marg. 491; *Hartridge et al. vs. Rockwell et al.*, R. M. Charlton's, 260, 266; *Story Eq. Juris.*, sec. 959a, 959b; 28 Geo. 803. 803, *Weaver vs. Garner*.

VII. A Court of Equity will not restrain by injunction an insolvent debtor from transferring his property before judgment. 1 *Hopkins*, ch. 365, *Moron vs. Dawes*; *Wiggins et al. vs. Armstrong et al.*, 2 *Johns.*, ch. 144; *Bellamy vs. Bellamy*, admr., 6 *Fla. Repts.*, 101.

VIII. An injunction will be dissolved on the coming in of the answer denying the equities of the bill. *Cowes vs. Carter*, 4 *Iredell Eq.*, 106; 5th *Iredell Eq.*, 26; 6th *Iredell Eq.*, 225; 8th *Iredell Eq.* 296.

M. D. Papy on the same side:

For appellants it is maintained that the order granted by the court below is not sustained by the allegations or prayer of the bill.

First. There is no speciad prayer for the order granted, and under the general prayer specific relief cannot be granted, unless such relief is agreeable to the case made in the bill. *Story's Eq. Pl.* Sec. 41; *English vs. Foxhall*, 2 *Peters*, 229, and authorities cited by Mr. Lovell.

The rule is, that if the bill contains charges putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain under the general prayer, but he cannot desert specific relief and under the general prayer ask specific relief of another description, unless the facts and circumstances charged by the bill will constantly,

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with the rules of court, maintain the relief. Lord Erskine, in *Hern vs. Miles*, 13 Vesey, 118, [119;] *Blount vs. Hay*, 4 Sanford Ch. R., 362, and cases cited by Mr. Lovell.

Second. The injunction ordered was not necessary for the protection of the alleged rights or claims of the complainants, because the property of which the alleged lien is said to exist was abundantly ample to respond to any decree that could be made, and was a fixture that could not be removed.

Third. In order to support a motion for an injunction, the bill should set forth a case of probable right and a probable danger that the right would be defeated without the special interposition of the court. 1 Randolph, 206, Mitford's Pleadings.

In this case there is not even a possibility of danger by any human calculation.

The mere allegation of a complainant that irremediable danger or irreparable mischief will ensue is not sufficient, but to entitle a party to an injunction the facts must be stated to show that the apprehension of injury is well founded. *Ansley vs. Lukeep*, 9 Gill & John., 468.

Fourth. The order granted by the court below is a decision upon the merits by anticipation, for it is only after a final decree that the court would, in any event, be justified in impounding the revenues of the road. The object of an injunction before answer is to preserve all things in their then condition, not to determine any by anticipation or to undo or restore anything. *Thebaut vs. Canova*, 11 Fla. R., 168.

The injunction is a preventive remedy. If the injury complained of be already done, the writ can have no operation, for it cannot be applied correctively (as it is attempted in this case), so as to remove it. It is not used for the purpose of punishment or to compel persons to do right, but simply to prevent them from doing wrong. *Att'y Gen'l vs. N. J. R. R. Transportation Co.*, 2 Green's Ch., 136.

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An injunction is a secondary process, and must be asked in aid of some primary equity, which must be disclosed in the same bill that prays it. Hilliard on Inj., 12.

Fifth. The complainants object to the lease of the road and make that the basis of the order.

First. It is not made in the bill.

Second. They are not the parties to make it.

In Arthur vs. Commercial & Railroad Bank, 9 Smedes & Marsh, 430, the court say: The question as to the power of the corporation (to assign away the railroad and the franchise annexed to it,) need not now be considered. That is a matter between the State and the Corporation, with which third persons have nothing to do.

If the lease to the A. & G. Co. is *ultra vires* and void, so was necessarily that to the Confederate government, through which complainants' alleged claim is said to have arisen.

Sixth. There is no lien legal or equitable. There was no contract between complainants and defendants. There was no fraud, and none is alleged, not even mistake. Vide authorities cited by Mr. Lovell.

Seventh. Alien for meliorations is only where a party makes them on the suppositions that he is the owner and is not aware of a defect in his title, and the true owner stands by without disclosing his title. Story, §388.

In all these cases the doctrine proceeds upon the ground of fraud or what is akin to it. Story's Eq., §391, 1238.

J. P. Sanderson for Appellees.

The statement of the case has already been sufficiently presented to the court by the counsel who have preceded me, and I shall, therefore, proceed to the discussion of such points as seem to me important in the elucidation of the case.

In doing so, I shall briefly call the attention of the court to such parts of the record as are material for my purposes.

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I propose, therefore, to consider together exceptions 2d, 3d and 4th, and lay down the following proposition as governing the case: When the bill sets forth a probable right and a probable danger that the right would be destroyed, an injunction will be granted. *Reed, et al. vs. Dews, et al., R. M. Charlton, 356.*

The second, third and fourth exceptions present but one question for the consideration of the court.

2d. Because the order is not supported by any prayer in the bill.

3d. Because it is not embraced in any prayer in the bill.

4th. Because it is not warranted by the relief prayed.

Prayer 1st. For answer all and singular the allegations, &c.

Prayer 2d. The second prayer (page 28 of bill,) prays, on final decree, a sale of so much of said branch road as lies between the State line and Live Oak Station, and out of proceeds to satisfy complainant's lien.

Prayer 3d. Asks for an account.

Prayer 4th. A general prayer for relief.

Prayer 5th. Asks an injunction restraining both companies from, in any manner, using said road, and from committing waste thereon.

DECREE.

1st. Takes jurisdiction of the parties.

2d. That complainants' bill exhibits equities that entitle complainants to the interposition of the equitable jurisdiction of the court.

3d. Enjoins defendants, &c., from executing or in any wise carrying into effect the agreement of defendants, disclosed by their answer, for lease or sale. Also enjoins from sale, leasing or any disposition of same.

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4th. Enjoins the A. & G. Co. from paying to the P. & G. Co. any of the consideration for the sale or lease or attempted sale or lease set forth in said agreement.

5th. Enjoins the A. & G. Co. &c., from disposing in any manner any of the income and earnings of the portions of the branch road lying between Live Oak and the Georgia line, except in payment for the necessary repairs of said road and necessary expenses of operating the same, having due regard to economy, &c.

6th. Requires the A. & G. R. R. Co. to make a monthly report to the court of the amount of receipts and disbursements for said portion of road, to be verified, &c.

7th. Enjoins the P. & G. R. R. Co. from disposing of any moneys received for freight or passage over said road until the further order of the court, and to make monthly reports, &c.

8th. Orders defendants to show cause on the 10th day of May, 1867, if any they have, why a receiver should not be appointed.

The question presented for the consideration of the court is, the decree, there being prayers for specific relief, account sale and payment, injunction and prayer for general relief, inconsistent with the case made by the bill.

The decree does not order a sale, is not a final decree.

It does not order an account of complainants' bill to be taken as prayed.

It does not grant an injunction in the terms and to the extent prayed.

The object of the bill, as shown with certainty, is to ask the interposition of the court to protect and enforce an equitable lien for work and materials furnished by artisans and mechanics upon a certain specified piece of railroad, and ascertain the value thereof and enforce payment therefor.

The decree determines that complainants have an equitable lien and are entitled to the interposition of the court.

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It enjoins the execution of a contract and payment of the consideration, which, if executed and carried into effect, might deprive them of their lien.

It enjoins the defendants respectively from disposing of the earnings of the road and to report amounts, &c., and then requires them to show why a receiver should not be appointed.

It is, therefore, contended that there is no relief granted by this decree, which is not agreeable to the case made by the bill and properly grantable under the prayer of general relief. See, on this point, Story's Eq. Pld., p. 43, §40 and n. and §41.

It is usual to pray for specific relief, but it has been held unnecessary that, under a prayer for general relief, without a specific prayer for the particular relief complainants think themselves entitled to, will be sufficient, and the particular relief may be prayed for at bar. Welford's Eq. Pld., 106 ; Wilkinson vs. Beal, 4 Madd., 408 ; Grimes vs. French, 2 Aik., 141 ; Beaumont vs. Boultres, 2 Vesey, 494 ; Heine vs. Hill, 13 Vesey, 119 ; Barbour's Ch. Pr., vol. 1, 37 ; 1 Dall. Ch. Pr., p. 437.

Other relief may be granted under a prayer for general relief, than that particularly prayed for, provided it be agreeable to the case made by the bill. English vs. Foxhall, 2 Peters, [612,] 8 condensed, 229.

There is a special prayer for an injunction as required where such relief is sought by the bill.

The decree made is agreeable to the nature of relief sought, and sustainable under the prayer for general relief, without the aid of the prayer for injunction.

In this case no injunction was granted. It is true the decree operates as an injunction, in some respects, in a modified form, but not inconsistent with the general prayer.

If the court should construe the decree in the nature of an injunction, though different from the one prayed for, it

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is the province of the court to mould or modify it, in its discretion, so as to attain the object sought.

Defendants have no cause of complaint for want of notice. They had notice of an application for an injunction to restrain them from operating the road.

Where a bill prays for a particular relief, and other relief, the orator can have no other relief inconsistent with that prayed for, but otherwise when the prayer for relief is in the disjunctive. 1 Ed. Ch., 654, *Willshin vs. Marfleet*; *Mitford's Ch. Pld.*, p. 41, n.; *Cotten vs. Ross*, 2 Page, 396-'8.

It is no objection to the decree that it is inconsistent with the specific prayer for relief when it is consistent with the case made by the bill, and the bill contains a prayer for general relief. *Wilkin vs. Wilkin*, 1 John. Ch. R., 111 and 117; *Coumbaugh vs. Smock*, 1 Blackf., 305.

The major includes the minor, and the cases cited by the learned counsel for appellants are of this character. *R. M. Charlton*, 280—good doctrine; 13 *Vesey*, 119; 1 John Ch. R., 115; 2 *Kelly*, 420—cited by appellants.

But if the court has erred this court can grant full relief or send the bill back for the court below to do so. *Southern Life and Trust Co. vs. Cole*, 4 Fla., 363.

It was urged by counsel that, on the ground of public inconvenience, the court would not grant an injunction. *Rigby vs. Great Western Railway Co.* 4 Eng. R. R. cases, 128.

On the contrary, says Mr. Williams, in his treatise on injunction, that slight infringement in respect of land by a large company of persons, ought to be watched with a careful eye and repressed with a strict hand by a court of equity, when it can exercise its jurisdiction. *Hill'd on Injunctions*, p. 28, §42.

It is contended by appellants that respondents should proceed with their suit at law and obtain their judgment before they can have a standing in this court.

There is no doubt as to the principle that when a party

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has a complete *remedy* at law, equity will not interfere. But this will not apply when, from circumstances not within his control, he cannot avail himself of his remedy. Hill'd on Inj., 15.

The answer is, such circumstances do exist, and are disclosed by the record, viz: Insolvency of P. & G. R. R. Co.

Attempted disposition of the only property not encumbered.

The vendee or lessee, the A. & G. R. R. Co., reside without jurisdiction of court. Hill'd on Inj. p. 17 and 22, §37.

These are sufficient without multiplying cases to give this court jurisdiction.

It was contended that the bill does not allege irreparable injury in so many words. This is unnecessary if, from the statement of the grievances, it appears that the injury would be irreparable, and the court can discover it from the allegation of the facts. Hilliard on Inj., p. 20, §32.

The interposition of courts of equity is successfully invoked to restrain the sale or other disposition of property, *pendente lite*.

The record shows this to be a case coming within that principle. 2 Story's Eq. Ju., §907 and 8.

The case of Canova vs. Thebaut, was cited by Mr. Papy, for the purpose of showing the object of an injunction, and although not explained, I presume it is cited to establish the point that injunctions will only issue to preserve things in their then condition.

The principle there laid down was before answer filed. Answers are filed in the case. See case 11 Fla., 168.

The doctrine is clearly presented in Hilliard on Inj., p. 3, §5, and that such a restraint should be imposed as may suffice to stop the mischief complained of, and when it is to stay injury to keep things as they are for the present.

It is conceded that the action of the court comes clearly within this principle. It stops transfer of property. It al-

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lows use of property, but requires an account, and after keeping the property in repair, holds the balance for any injury that may be sustained, thus stopping the injury complained of. Hilliard on Inj., p. 3, §5.

It was contended that complainants are in laches and therefore deprived of their rights.

Record shows a suit commenced in July, 1866, and as soon as they had any knowledge of an attempt to dispose of road, filed bill on 17th April, 1867.

Answers do not bring knowledge home to complainants, while record shows a state of facts which brings home with absolute conviction, a knowledge of their claim to both defendants.

An injunction may issue to stay trespass.

Defendant, the Atlantic & Gulf Railroad, set up in their answer the grounds of their defense, and rely on.

1st, The illegality of contract growing out of the attitude of the Confederate Government to the United States.

In equity, as between the parties, the general maxim of *pari delicto* does not always prevail—circumstances of the case often form the exception. Bellamy vs. Bellamy, 6 Fla., p. 103, and cases cited; Hughes vs. Orchard, 1 Wall., 72.

But we contend there was no illegal contract. The Confederate Government was a Government *de facto*—had belligerent rights. Prize cases, 2 Black, 666-7, and Wheaton's Int. Law, §23.

2d. That they are purchasers for value without notice alleging payment before bill filed.

This is not sufficient: it must have alleged that they had notice before the execution of the title and payment of purchase money: if they had notice before either of these it is not sufficient. 2 leading cases in Equity, top pag. 45. Han & Wallace's Notes: Howlit's heirs vs. Thompeon's heirs, 1 Widell, 369. Neither the deed nor the lease has

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been executed. But the record shows that both defendants had notice.

Suit pending in the county where the principal office of one defendant is established is constructive notice. See contents of declaration.

The doctrine of *lis pendens* is a general notice of an equity to all the world: 2 Pier Williams, 482.

The answer is denied by the affidavit on file.

The Chancellor had the whole case on bill, affidavits and answers, before him, and gave the weight of evidence in favor of complainants, leaving the question for final decree on the evidence.

The 1st, 5th and 10th exceptions present substantially the same grounds of error for a reversal of the decretal order of the court below, and may be properly considered together.

1. Because the said order and decree is not based upon, or sustained by any of the allegations of the bill.

5. Because it is not sustained by any of the alleged equities of the bill.

10. Because it is not sustained by the principles of law and equity applicable to the case.

These exceptions go to the merits of the bill, and if well taken must necessarily settle the case.

The material parts of the bill necessary to consider, present the following case:

In 1864 the Pen. & Ga. R. R. Co., then owning the portion of the Road in controversy, having left it in an unfinished condition, entered into some agreement with the Confederate Government, by which said Government was to complete the road-bed, &c., and place thereon the iron. That complainants were placed on said Road by the Confederate Government, and employed to do everything necessary to place the road-bed and track, including culverts and bridges, in a fit condition to be used and operated.

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That this was done with the knowledge and approbation of the Pen. & Ga. Co. That complainants did this work, and furnished the materials to the amount charged in the bill, of about \$38,000. That they are professional Rail Road contractors and builders, and as such performed the work and furnished the materials used. That they were in possession of said Road, upon which they had expended their means and labor, and that the P. & G. R. R. Co., knew they were so possessed.

The bill specifically sets forth the nature, extent, amount and value of the labor performed and materials furnished.

The bill also alleges, that during the time they were performing this work and labor, a war was existing between the Confederate States and the United States, and that in 1865 the war ceased, and the complainants were in possession of said Road at the time, and had not surrendered their possession of their work, labor and materials, to the Confederate Government; and that the Confederate Government had never accepted or received said Road or paid complainants therefor; and that complainants were never legally divested of their possession of the same.

Bill alleges that complainants have a lien upon said road, for the work and labor thereon by them performed, and for the materials by them furnished therefor, and distinctly charges that they have a lien on each and every part of said Road therefor, and that it had never been lost or surrendered, and that they cannot be divested thereof, until the same is satisfied and paid.

It charges an illegal dispossession of complainants by defendants, and refusal to pay them, and that defendants had knowledge of complainants' lien.

It charges that defendants, one or both, have taken possession of their labor, work and materials, and are enjoying the same, and have not paid therefor, to complainants' injury.

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It charges both defendants with endeavoring to defeat complainants' lien.

It charges insolvency of P. & G. R. R. Co., and alleges that they are remediless unless their lien is enforced.

It charges that defendants, one or both, but which is unknown to complainants, are now in possession of said Road, and using and operating the same to the detriment of their lien and value of the property.

It charges that a sale or an agreement of some kind has been entered into between defendants, by which the title of the road may be transferred to defeat lien.

It charges that suit was instituted by complainants against the Pen. & Ga. Co., and that the A. & G. Co. have taken the Road with notice of lien, &c.

Bill calls upon defendants for discovery as to certain allegations relative to the nature and character of the agreement between them touching the sale—consideration or transfer of said road, including time of payment, &c.; whether paid.

The allegations of the bill show then, that complainants have expended a large amount of capital in labor, work and materials upon the property of one of defendants, viz: the P. & G. R. R. Co., and that said company has the benefit, use and enjoyment thereof, and have paid nothing therefor; that this improvement was made with their knowledge and approbation.

The bill, therefore, shows that the P. & G. Co. are debtors for so much as the work and labor and materials are reasonably worth, and that the work, labor and materials were of that character which constitutes an equitable lien upon the road-bed and materials by them placed thereon.

The first question to ascertain is, are complainants creditors of the P. & G. R. R. Co.?

It is admitted by defendants' answer that the Confederate Government was to put the Road in running order and

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have the use of it during the war, free of charge, and at the close of the war the Pen. & Ga. R. R. Co. were to have the privilege of purchasing the superstructure and improvements placed thereon from the Confederate Government. They were not, therefore, to have the benefit of the capital expended on the road without making compensation.

The bill shows that the Confederate Government neither paid for the improvements, or had the use or benefit of them. The war closed before the Confederate Government used or operated the Road, and the P. & G. Co. took possession and have enjoyed the fruits of complainants' labor and capital.

Will not equity, then, substitute complainants to the rights the Confederate Government would have had, if it had continued a Government, and exact payment thereon?

[The P. & G. Co. were, by the admission in the answer, privies to the contract with the Confederate Government and complainants.

In support of the proposition the following authorities are cited: Story Eq. Ju. 5, 388, 506, 513, 1232, 1234, 1236, 1238, 1218, 1219.

These authorities clearly establish the jurisdiction of this Court, and that as charged in the bill the P. & G. R. R. Co. are debtors to complainants, and that complainants have a lien which equity will enforce.

The P. & G. Co. have no right to complain; it is no worse for them to pay the complainants than to the Confederate Government.

But the Pen. & Ga. Co. seek to set up a breach of the understanding had with the Confederate Government as a bar.

The court properly disregarded this; for when a new equity is set up by the answer the court will not regard it on a motion to grant or dissolve an injunction. *Young & Bryan vs. McCormick*, 6 Fla., 170 and 369.

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The equity set up by the answer of P. & G. Co. would not avail on the final hearing.

They show no effort to enforce their right, but acquiesce in the action of the Confederate Government, and permit their property to be improved by complainants.

If a true owner stands by and suffers improvements to be made on an estate, without notice of his title, he will not be permitted in equity to enrich himself by the loss of another. 2 Story. Eq., Ju., S. 1237—S. 799 b. and n. 3. See case of Putnam vs. Ritchie, 6 Paige, 390, 403, 404 and 405.

Complainants are skilled in their line of business, and are of the class recognized as to be entitled to lien upon the work for their compensation. They knew that an arrangement had been made for this work to be done by and between the Pensacola & Georgia Rail Road Co. and the Confederate Government, and complainants were employed to perform it. They are ignorant of said agreement and of its terms. They are not chargeable with the failure of the Confederate Government to carry out its terms. They have improved the property. The Confederate Government never used or derived any benefit from it, and the P. & G. Co. has. Why should they in equity and good conscience pay complainants?

To hold the Pen. & Ga. R. R. Co. is not responsible, would enable the perpetration of gross frauds upon mechanics and laborers, &c.

This cause came up on bill and answers, upon a motion for an injunction, notice thereof having been given.

The case was properly considered upon a full investigation of the merits as disclosed by the bills and answers by the Chancellor on the motion.

On an application for an injunction a chancellor may go into the merits as disclosed in the bill, and which are intrinsic and dependent upon its express allegations and charges. City of Apalachicola vs. Apalachicola Land Co., 9 Fla., 340.

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We claim under this appeal that the appellants are restricted in their efforts to procure a reversal of the decretal order of the court below to the error assigned, which the appellees are at liberty to show (if they can) that upon the whole case no other decision could rightfully be made of the case in the appellate court.

That it is the duty of the court to consider the whole merits of the case, and if upon due consideration thereof, it should come to the conclusion that the decretal order of the court below is erroneous, it will proceed to pronounce such order as the court below should have done. *Southern Life & Trust Co. vs. Cole*, 4 Fla., 359.

These authorities are conclusive as to the duty of this court.

The bill and answer of the defendants, the Pen. & Ga. Co., clearly establishes a liability on the part of this defendant to compensate complainants, and as far as that defendant is concerned or affected by the order, it must be sustained.

The P. & G. Co. was privy to the contract for repairs to the road; were to pay what was the value at the close of the war; their property was to be improved with their knowledge and consent, upon the happening of an event to pay.

The breach or part performance by the Confederate Government, as set up in answer would not exempt the P. & G. Co. from liability—they having accepted, used and derived benefit from it. 2 Story Eq. Ju., §1235 and 1236, and note 1.

Have not complainants in making these repairs and improvements, acted bona fide and innocently, and has there not been a substantial benefit conferred on the owner? If so, ought not the P. & G. Co. *ex aequo et bono*, to pay. Equity affords relief in such cases. 2 Story Eq. Ju., §1237.

It has been supposed that courts of equity do not grant relief in favor of a bona fide possessor making permanent

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improvements by sustaining a bill brought by him therefor against the owner after he has secured the premises at *law*. 2 Story Eq. Ju., §1237, n. 4 and 1239.

Defendants have not recovered possession by law. We contend their possession is wrongful, and that we occupy the same position as if they had brought their bill to obtain possession. *Ibid.*, and 1217, 18 and 20.

This was a lease for a term, stipulating to improve the property during the term, and for payment therefor at the termination of the lease by the lessor.

“A contract whereby the owner of land leases the same for a period of five years, and the lease stipulates to erect a building thereon during the first year of the term a building of the value of \$3,000, the lessor covenanting in addition to the annual value of the premises (which is fixed at \$300) to pay to the lessee when the building shall have been completed the sum of \$1,500, although in one aspect an improvement lease, is *nevertheless, as to mechanics and material men*, a contract for the erection of the building, payable partly out of the profits of the land, and the estate of the lessor is bound by the mechanic's lien.” Cited in 21 vol. U. S. Digest, Woodward vs. Leily, 36 Penn. State Reports, 437.

Under the authority of the case cited from 6 Florida, 363, South. Life Ins. & Trust Co. vs. Cole, we contend that an appeal in equity is substantially a re-hearing of the cause and opens up the whole case to the respondents in the court, while appellants are restricted to their assigned errors for a reversal of the decretal order. Appellants may assume a new ground for relief not specially prayed for in the bill, and not asked for in the court below. It is, therefore, competent for this court to grant the injunction in the terms of the prayer, if the court thinks the equities of the bill should justify such order, or this court may modify or mould the order of the court below according to the rights

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of the case made, and give such relief as equity and good conscience requires.

As has been stated by my associate counsel, appellants have abandoned by their assignment of errors, the following points made by answers, viz: 1, question of jurisdiction; 2 the illegality of the contract; 3, nor the general demurrer for want of equity in the bill under statute. Rules of court adopted 1852.

The answer of the P. & G. R. R. Co. admits that the Company did enter into a contract with the Confederate Government under which their road was to be repaired, &c., and that at the close of the war the company was to pay for them.

It does not deny that the work was done by complainants, but seeks to avoid liability by alleging breach by Confederate Government.

Does not show that complainants were ever notified by them of the breach, or that the company ever, in any manner, attempted to prevent complainants from completing the work, but stood by and permitted them to improve their property.

It does not appear from answer but that complainants entered upon the road and performed a large portion of their work before breach of contract by Confederate Government.

The answer admits insolvency of Company.

Answer claims the property surrendered to them by U. S. Government.

The Government of the United States could not acquire any rights to the property except upon a decree of forfeiture and condemnation, which is not set up by answer—their possession was therefor tortuous.

D. P. Holland on the same side.

The appeal comes from the decretal order of the Hon. T. T. Long, sitting at Lake City at chambers in equity. The

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bill was filed in Suwannee Circuit Court, and by consent the answers were filed and the cause transferred to Columbia county, where at Lake City all further proceedings were had in the suit: the consent of the solicitors of both parties, complainants and defendants, in the court below, appears of record and further the order of the court thereon.

The bill was filed on the 3d day of April, 1867, in Suwannee county, and on the same day subpoena issued to defendants, and was served on the Atlantic & Gulf R. R. Co. by service on its agent on the 4th of April, and on the Pensacola & Georgia Railroad Co. by service on its President on the 5th.

On the 4th of April, A. D. 1867, a notice was served on the agent of the Atlantic & Gulf R. R. Co. at Live Oak, in Suwannee county, notifying the defendants that the complainants, on the 18th day of April, would apply to the Hon. Thos. T. Long, Judge of the Suwannee Circuit Court, at his chambers in Lake City, or as soon thereafter as counsel could be heard, for an injunction to issue according to the prayer in the bill filed in this cause, and a like notice was served on the Pensacola & Georgia R. R. Co., and on the 18th day of April, the motion of complainants for injunction was set for hearing on the 24th April, A. D. 1867 and in accordance with said consent the answers of the defendants were then filed.

The cause thus set for hearing came on to be heard on motion of complainants, that the writ of injunction do issue according to the prayer of the bill.

The decree shows that the motion was heard upon bill, answers and ex parte affidavits sustaining the statements in the bill and accompanying the affidavit. And the complainants and defendants appearing by their respective solicitors, and having been fully heard after answers filed, the court thereupon made its decretal order:

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DECREE.

1st, That the court had jurisdiction.

2d, that the bill of complainants exhibits equities that entitled the complainants to the interposition of the equitable jurisdiction of the court.

3d, The Pen. & Ga. R. R. Co., and the Atlantic & Gulf R. R. Co. are enjoined, until the further order of the court, from executing or in any wise carrying into effect the agreement relative to the Branch Road as exhibited by their answers. Further, they are enjoined from selling, leasing, or in any way disposing of said Branch Road, or encumbering the same in law or equity.

4th, Enjoining until the further order of the court the Atlantic & Gulf R. R. Co. from paying over to the Pen & Ga. R. R. any sums of money growing out of the consideration upon which the aforesaid agreement, contract, or attempted sale or lease was made, and growing out of the capital stock of the Atlantic & Gulf R. R. Co. transferred to the Pensacola & Georgia R. R. Co. under the agreement.

5th, Enjoining until further order of the court, the Atlantic & Gulf R. R. Co. from disposing of the income and earnings of said Branch Road, except in the payment of the necessary repairs of said road and expenses of running and operating said road, having due regard to economy.

6th, An order requiring the Atlantic & Gulf R. R. Co. to make a monthly report to the court, showing the gross amounts of its receipts on that portion of the Branch Road in controversy, and the amount expended for repairs and operating the same.

7th, Enjoining the Pensacola & Georgia R. R. Co. until further order of the court, from disposing of any moneys which they may receive for freight or passage money over that portion of the Branch Road.

8th, And that said company do make monthly reports of such receipts as may come to their hands under oath.

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9th, Ordering the defendants, the Pen. & Ga. R. R. Co. & the Atlantic & Gulf R. R. Co., to appear before the Chancellor on the 10th day of May, 1867, to show cause, if any they have, why a Receiver should not be appointed in the cause.

The decree is made on the 3d day of May, A. D. 1867.

On the 9th day of May, 1867, the appellants by their solicitors entered their appeal to this court from said decree.

Herewith I give a statement of the case as presented by the bill and answers:

STATEMENT OF THE CASE.

Complainants allege in their bill that the defendant, the P. & G. R. R. Co., by virtue of their charter under the laws of Florida, were authorized to build and construct certain railroads, and, among others, a certain branch railroad from the main track to the Georgia line, and had partially erected a superstructure for a branch railroad from a station on the P. & G. R. R., known as Live Oak or Station No. 7, it being within the county of Suwannee and State of Florida, running thence through the counties of Suwannee and Hamilton, in the State of Florida, to the boundary line between the States of Georgia and Florida, where it was to connect with a branch road, the property of the defendants, the Atlantic and Gulf Railroad Company.

That the said branch road from Station 7 or Live Oak to the Florida line had been partially graded, but left in a very unfinished and incomplete manner, and being exposed to the weather from the time the work had been done, without due care having been taken thereof, the same had become washed and injured so that it required a great deal of labor and large expense and skill to place the same in condition so that the "track" could be laid thereon.

The bill shows such was the condition of said branch road when the P. & G. R. R. Co. entered into *some* agreement,

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or terms, or contract with the Confederate States or military authorities thereof, whereby the C. S. military authorities, with the full knowledge of the P. & G. R. R. Co., placed Spratt & Callahan in possession of said branch road from Live Oak to the Georgia line, for the purpose of altering, improving, furnishing materials therefor, repairing the embankments, ditching cuts, and putting the road-bed in a fit and proper condition to receive the track.

That Spratt & Callahan are railroad contractors and builders, and that they did contract with the Confederate States to repair said road from Live Oak to the Georgia line, and to furnish all the materials and labor, and to build and put the same in *complete* working and running order, saving and accepting the iron.

That, in April, 1864, they were placed in the possession of said branch road by one Minor Merriweather, Major of Engineers of the C. S., and Commissioner on its behalf for the purposes aforesaid; and that said Minor Merriweather and the C. S. were fully organized and empowered so to do by the Pensacola & Georgia Railroad Company, by virtue of an agreement or contract between said railroad company and the C. S. and its authorities.

That the P. & G. R. R. Company did know of Spratt & Callahan being engaged in the work and labor aforesaid; that when they went into possession for the purpose aforesaid to-wit, in April 1864, they found the road in the dilapidated and incomplete condition above described.

That they expended thereon, in the employment of laborers, tools, vehicles, animals, provisions and materials, and employed great skill in the improving of, creating and erecting said branch road, large sums of money, amounting in the aggregate value, to be \$37,379.60-100, in the currency of the United States—the aggregate sum consisting of the following items:

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Repairing 22½ miles of Road Bed	\$3,375 00
27,724 Cross-Ties, at 40 cents each,	11,089 60
Laying and Embedding Cross-Ties 22 miles, at \$300 per mile,	6,600 00
Howes' Patent Bridge across the Suwannee river, 174 feet, at \$60 per foot,	10,440 00
2 Abutments therefor,	4,500 00
Trestle Bridges over the Alapaha and Tiger Creeks, 275 feet, at \$5.00 per foot,	1,375 00

This being the aggregate, \$37,379 60

That when they were employed and put in possession of said branch road, and while they were constructing the same, *a war* was existing between the Confederate States and the United States, and that in the year 1865 the Confederate States ceased to exist; that at the time of the surrender of the Confederate States, your orators were in possession of the branch road; that Spratt & Callahan never surrendered the said possession to the Confederate States or its agents, or to any person, and never received pay for the work and items aforesaid.

Spratt & Callahan charge that they have a lien for their work and labor and materials on every portion of said branch railroad by them improved, erected and completed as aforesaid that said lien has never been lost or surrendered by them, and that the defendants and all other persons are bound by the same, and cannot divest complainants of the same until their full charge is paid.

That the Pensacola & Georgia Railroad Company, in violation of complainants' rights and liens aforesaid, and against their consent, deprived them of the possession of said road, and refuse to pay said claim or any part thereof, and have appropriated to their *own use and benefit* the skill, labor, &c., of complainants, expended on the improvement and erection

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of said branch road, in violation of equity and good conscience, and to their great wrong and injury.

They state on information, which they believe, that the P. & G. R. R. Co., *since* they illegally and unlawfully deprived your orators of possession of said road, have sold or leased the said branch road to the defendant, the Atlantic & Gulf R. R. Co., for an immense sum of money, and have delivered over the possession of the road, together with the work and labor and materials of complainants, to the said A. & G. R. R. Co., and that now, at the time of the filing of the bill, said P. & G. R. R. Co., and the A. & G. R. R. Co., or *either or both*, are in possession of the branch road, and running and using the same to the *great injury* of complainants, and in violation of their rights.

That complainants cannot state which of the two companies are at this time the true owners of said branch road.

That each of the Presidents of said railroad companies, and *both*, *knew* that complainants had never surrendered or delivered the possession of said road to the Confederate States or to any person, and that they never had been paid for their work and labor; and although the defendants had such knowledge, they have wrongfully deprived complainants of the possession and refuse to pay their just claims, and that they are jointly and severally trying to defeat complainants of their just dues and destroy their lien aforesaid; and that the defendants, by some agreement between them, *unknown* to complainants, now running and using said road, *to the detriment*, in value of the same, and *to the injury of the lien and claim and debts* of complainants.

They charge that the P. & G. R. R. Co. is insolvent, and that there are numerous liens on main line of the company; that unless their claims and debt can be enforced on the branch railroad, which is improved, partly erected and completed by their skill and labor and materials, they

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are without remedy, owing to the prior lien on general property of the P. & G. R. R. Co.

Complainants allege that it would be against equity and good conscience to deprive them of their lien on said road and to permit the Atlantic & Gulf Rail Road Company to pay to the Pensacola & Georgia Railroad Company whatever sum of money which may have been agreed upon between said companies for the transfer of said branch Road to the A. & G. R. R. Co., without first requiring the just and equitable claim of the complainants to be paid, or to permit the said companies or either of them to use said road and wear out the same to their injury.

That in October, 1866, complainants instituted suit in Leon Circuit Court against the Pensacola & Georgia Rail-Road Company for the value of their work and labor aforesaid; that the common law suit was defended by said company, who appeared by their attorneys, and is still pending, having been continued at the Spring Term, A. D., 1867, of said court to the Fall Term thereof.

Complainants further show that *since the commencement of said suit* and the service of the process of the Pen. & Ga. R. R. Co., the said company have attempted to defeat the lien of complainants and make the judgment of the Leon Circuit Court valueless, by divesting themselves of the possession and obtaining from said A. & G. R. R. Co. the full value thereof, so that complainants allege and charge they are without remedy at law; that after judgment at law was obtained in the Middle Circuit of Florida, the execution issued thereon could not be satisfied without the aid of the equity jurisdiction of *this* court to enforce the lien aforesaid on the Branch Road, as the subject matter or property lies in the jurisdiction of this court, and as before judgment could be obtained the defendants (the two Rail Road Companies) by confederating and wrongfully depriving complainants of the possession, and by continued use of the

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same will have so injured the Branch Road as to decrease its value; and further that the Atlantic & Gulf Rail Road Company will then be the owner of said Railroad, *and the same not liable to the judgment aforesaid* without the assistance of the chancery jurisdiction of the Suwannee Circuit Court.

Complainants charge that the judgments could not be satisfied by the general property of the Pensacola & Georgia Rail Road Company for the reasons aforesaid of prior liens and mortgages, and indebtedness against said company now existing.

They further charge that the Atlantic & Gulf Rail Road Company did, prior to said sale or lease from the Pensacola and Georgia Railroad Company of said Branch Road, have notice of the existence of said suit, and in full knowledge of the same entered into said sale or agreement, and thereby took the said Rail Road subject to the liens of your orators.

The bill calls upon the Pensacola & Georgia Rail Road Company to make discovery by answering:

1st, Whether it was not possessed of the franchise of the said Branch Rail Road.

2d, Whether the Pensacola & Georgia Rail Road Company have disposed of said franchise or leased the same, and if so, when, to whom, and upon what consideration, and that they annex to their answer a correct copy of the instrument or lease, or conveyance or agreement of the same between them and any other party relative to said Branch Road.

3d, That the said Pensacola & Georgia Rail Road Company answer fully and particularly whether they have received the consideration, and if not, when the same is to be paid, and of what it is to consist—whether money, stock, bonds or obligations of any corporation or person, and that they set forth the obligations, if such there can be, that form the consideration.

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4th, That the Atlantic & Gulf Rail Road Company answer whether they are now in the possession and using the said Branch Rail Road from the Georgia Line to Live Oak, in Suwannee county, and if yea, when they went into the possession or took control thereof or used the same, and that they set forth the conveyance or instrument or agreement entered into between them and any corporate company or person, whereby they obtained such right, and that they give particularly the kind and character of the consideration which they have paid or which remains unpaid, and the dates thereof.

The prayers of the bill are:

1st, That at the final hearing of the cause a decree may be granted for a sale of the said Branch Road to satisfy the claim and lien of complainants.

2d, That some suitable person be appointed to ascertain and report to this court what sums of money may be found to be due and owing by the defendants to the complainants.

3d. A prayer for general relief.

4th, For a writ of injunction issuing out and under the seal of this Honorable Court, to be directed unto the said "The Pensacola & Georgia Rail Road Company" and "The Atlantic & Gulf Railroad Company," restraining them, their servants, workmen and agents, from running, using or running locomotives and cars over said Branch Road or any part thereof, or committing any waste thereon or in any way, manner or form using the said Branch Road from Live Oak Station to the Georgia & Florida boundary line, until the further order of this court.

5th, A prayer for the writ of subpoena to the defendants.

The facts of the bill are verified under affidavit, and that complainants are "unable to give bond of indemnity or other security."

This bill was filed in Suwannee Circuit Court April 3d,

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1867, and on the same day subpoenas were issued against the defendants.

The subpoena to the Pensacola & Georgia Railroad Company bears the following return:

“Executed the within subpoena in Chancery, by handing a true copy thereof to Edward Houstoun, President of the Pensacola & Georgia Railroad Company, this 5th of April, A. D. 1867.

R. SAUNDERS, Sheriff,

By G. C. TOWNSEND, D. S.”

It bears the following endorsements of the Sheriffs:

“Came to hand April 3d, 1867.

W. D. GREEN, Sheriff.”

“Came to hand April 5th, 1867.

R. SAUNDERS,

Sheriff of Leon County.”

The subpoena to the Atlantic & Gulf Railroad Company bears the following return:

“Executed the within subpoena by serving a true copy of this subpoena on E. F. Henderson, the agent of the Atlantic & Gulf Railroad Company, at the office of said company and agent at Live Oak, in Suwannee county, this 4th day of April, 1867.

W. D. GREEN,

Sheriff of Suwannee county.”

Notice was served in like manner to the defendants, respectively, to appear at Lake City on the 18th day of April, at the Chambers of his Honor T. T. Long, Judge, to show cause, if any they could, why an injunction should not be granted according to the prayer in complainants' bill.

On the 18th day of April the following consent rule was read and taken in open court at the Spring Term of Columbia county:

“It is agreed between the Counsel and Solicitors of the complainants, and of the defendants, ‘That the hearing of

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the motion of complainants for injunction to be set for hearing before his Honor Thos. T. Long, Judge, at his Chambers at Lake City, on next Wednesday, the 24th of April, at 10 o'clock, A. M.'

"It is further agreed, 'That the separate answers of the defendants shall be filed by his Honor Judge Long, and the same shall have like effect as if filed in the Clerk's office of Suwannee Circuit Court by the clerk thereof.'

D. P. HOLLAND,

Solicitor for Complainants.

LAW, LOVELL & FALLIGANT,

Solicitors for A. & G. R. R. Co.

PAPY & WESTCOTT,

Solicitors for P. & G. R. R. Co."

Thereupon, the separate answer of Pensacola & Georgia Railroad Company was filed on the 18th day of April, A. D. 1867. And the separate answer of the Atlantic & Gulf Railroad Company was filed at the same time. And the motion for the granting of the injunction set for hearing on the 24th inst., at 10 A. M.

The separate answer of "The Pensacola & Georgia Railroad Company" insists that—

1st. That there is no equity in the bill.

2d. That this Court has no jurisdiction to grant the prayer thereof—and that the defendant is not bound to answer the same—and insisting on the special matters set forth, and have the same benefit thereof as if it had pleaded the same or had demurred to said bill.

Yet, nevertheless, the answer says: That by virtue of their charter and amendments, this defendant was authorized and empowered to construct said branch road. That it had proceeded to construct said branch road, and had fully graded and trestled the same, and prepared it for laying the iron rails thereon, when, owing to the war then

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existing between "the United States and the so-called Confederate States," the work was arrested just at the point where the laying of the track would have commenced.

That it incurred and paid the whole cost and value necessary before the iron rails were laid, including a large number of cross-ties, which were distributed along the line of said branch road, ready to be used whenever the iron rails could be procured.

That during the war it sought to obtain the iron.

"That during the continuance of the war it sought in various ways to complete the said branch road for the grading and trestling of which, as already stated, it had expended the full value, but failed, because it was unable to procure the iron rails."

That during the war it became the adopted policy of the C. S. to seize upon such roads as it deemed necessary for military purposes, and to facilitate its operations in carrying on the war then waging with the United States, and in some instances taking up the iron rails from one road and placing them upon another.

That this policy was adopted with respect to the branch road, and it was informed by the agent of the C. S. that such was its purpose, and its expectation, and design to lay the iron rails thereon by the C. S. at its own expense, and to use the road for its own benefit, except so far as by the constitution and the laws compensation was required to be made to defendant.

That it was the design of the agent of the Confederate States to avoid, if they could the payment of compensation as required in all cases of seizure or impressment, and to that end various propositions and terms were made and offered, "and finally it was agreed that the Confederate States should have the use of the road-way on said branch road, together with such cross-ties as this defendant had provided for that purpose, free of any charge, owing to the

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war, at the conclusion of which this defendant was to have the privilege of purchasing the superstructure laid by the Confederate States upon said road-way, and bridges, &c., &c., and if the parties could come to no terms as to price, the Confederate States was to have the right to remove the same."

The answer next alleges a certain agreement entered into through the attorney and agent of the C. S. with the Florida Railroad Co., relative to taking so much iron, and chairs, and spikes, from the Florida Railroad, and completing the branch road, and after the establishment of peace, providing for the same to be replaced on the Florida Railroad at the cost of the C. S., and they file as exhibit "A" copy of said agreement, which is made a part of the answer. And that as soon as it was informed of the said agreement, which was a few days thereafter, it objected thereto, and at once informed the agent and attorney of the C. S. of "its opposition to the same, as conflicting with the agreement entered into with this defendant," and if the Confederate States proceeded thereunder, it would regard it as in violation of its rights under the agreement made with it, and protested against the taking of possession of the branch road.

That the C. S. by its agent, proposed another agreement with defendant, but it was refused.

That notwithstanding the protest of this defendant as aforesaid, and notwithstanding the violation of the contract made with it as aforesaid, the Confederate States and its agents proceeded to use the branch road aforesaid, and to retain the possession thereof; and did lay down on the track the iron it had obtained from the Florida Railroad Company under the agreement aforesaid. That although this defendant was not bound longer by said agreement, it had no means to "regain the possession of said road which had been taken and then was in possession of the C. S."

The answer next alleges that the complainants were well

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advised of the policy of seizure and impressment that had been adopted by the C. S.

That in all such cases and "where the use of property was permitted to the Confederate government, all expenses and cost of repair or completion were borne by the C. S. without liability on the part of the owner, and without expectation on the part of contractors, workmen or others, that any person other than the C. S. was liable for or would pay for work performed or materials furnished."

That in this case the defendant had no authority or power to prevent the complainants from executing the contract they had made with the Confederate States through their agent with respect to this branch, and if it had attempted it the complainants would not have heeded it.

That the complainants looked only to the C. S. for pay for work performed and materials furnished by them on said branch road; that the same was provided for by contract between them as to mode and amount; that the continuing in the possession of said branch road was in violation of the rights of defendant, and not in conformity to the contract it had agreed to.

The answer next says that there was no responsibility from defendants to complainants in any form, and denies that the failure of the C. S. to pay the complainants gives them any right in law or equity to assert and maintain their claim against defendant.

That on their contract they gave credit to the C. S. with the full knowledge that at the end of the war the road, whether held under the contract with defendant or against it, and notwithstanding the protest as aforesaid, would come back and be received by defendant, without any responsibility in law or equity for any obligation which might have been incurred by the C. S.

That complainants in fact and in law assumed all the risks of being paid by the C. S., and did not suppose or act

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on the supposition that defendant was liable to them, or that there existed a lien on said branch road against defendant; and denies that the possession of said branch road was delivered to complainants by the C. S.; and denies positively that it had knowledge of any such possession being delivered to them; and says it is not customary to deliver possession of road to contractor, whose work is limited to something short of complete construction, and especially was it not necessary in this case, because the defendant had completed the grading and trestling.

That the C. S. had no lawful authority to deliver possession to complainants or to any person, so as to impair or defeat the right of this defendant to the possession of said road at the end of the war, or in any way to prevent it from discharging its duty to the public by operating said road according to the requirements of its charter.

That before the end of the war, and before the surrender of the C. S. and its armies, the said C. S. were, in fact, in the complete occupancy and possession of the branch road, and had run their own trains of cars over the same, without objection, murmur or dissent from complainants or either of them, so far as defendant ever heard, and without the assertion of a right on their behalf to interpose.

That upon the surrender, the United States authorities took possession of said branch road as captured property, liable to confiscation, and retained possession for some two months or more, when the road and this branch were turned over to defendant. It therefore denies that it took possession of said road and deprived the complainants thereof; but asserts "that complainants never had legal possession, (or actual possession, so far as was necessary to enable them to perform their contract with the Confederate States.)"

The defendant did not, in fact, deprive complainants of the possession, but in fact received the same from the authorities of the United States, without the remotest idea

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at the time, that it was or would be considered by complainants liable to pay what they had agreed to take from the C. S., and from whom alone they expected payment.

That the United States, on the application of the Florida Railroad Company, authorized the removal of the iron that had been placed on the branch road, the Florida Railroad Company being entitled to the same under its contract with the C. S., and that the defendant offered no objection, but facilitated the tearing up and removal of the rails from the branch road.

That upon the surrender of the C. S., it had the legal right to enter upon and take possession of its said branch, without responsibility to complainants for whatever work might have been done while in possession of the C. S.; that the possession was transferred by the United States to defendant, the same having been in actual occupancy by the C. S.

That there was no lien, express or implied, in favor of complainants, nor did the C. S., or its agents, or officers, have the legal right to create a lien in favor of the complainants; and defendant denies that it had any notice of such pretended lien until the filing of the bill.

Defendant answers—that on the termination of the war, its means being crippled and its resources curtailed for want of means, it concluded to dispose of said branch road to the Atlantic & Gulf Railroad Company, so as to complete the connection at an early day between the main lines of road in Georgia and Florida, and thus secure to the public the benefits intended by the law. That the defendant in last July concluded an agreement with said Atlantic & Gulf Railroad Company for the sale or lease of said branch road, which has been consummated so far as to deliver said branch road to said Atlantic & Gulf Railroad Company, and annex the agreement as exhibit "B," and make it a part of the answer.

That at the time of making the agreement the defendant

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had no notice of the alleged lien of the defendant, and never imagined that any legal claim existed against it for said work or materials, and therefore denies that it had attempted to defeat the said pretended lien by the transfer of the branch road, or that the same does, in fact, affect any legal claim which complainants have against it.

The answer denies that the running or operating of the branch road by the defendants in any wise impairs or affects injuriously the pretended claim of complainants. And as the road has been graded and trestled at the cost of defendant, before the C. S. got possession thereof, and as to the road bed so as aforesaid constructed, there exists no shadow of pretense of a lien.

That the lien was procured and laid on the track at the cost and expense of the Atlantic & Gulf Railroad, and as to that there is no pretense of a lien.

That if there is any lien or claim existing against the defendant, no injury or damage can arise to complainants by the continued operations of said branch road, but great damage would result to the said Atlantic & Gulf Railroad, and great inconvenience to the public, without any benefit to the complainants, if the running of the road were to be enjoined.

Answer insists that the pendency of the suit in Leon Circuit Court is in abatement of these proceedings, and that the same should be dismissed.

That the value received by it for the branch road did not exceed, if indeed it reached, the actual cost to the defendant of the branch road.

That the defendant knows nothing of the pretended claims of complainants, or whether they did or did not receive any compensation from the C. S., except what they derive from the allegations and statements of complainants, and insist that full proof should be required of them; but in no event

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does it admit that in law or equity it is responsible for the same.

And for further answer—"That the office of this defendant, and the residence of its President, is in Leon county, in the Middle Circuit of Florida; that the larger part of said branch road lies in the Middle Circuit aforesaid; that this defendant is by law suable only in the county of Leon aforesaid, and that the jurisdiction of the Circuit Court of the Middle Circuit is ample for all the purposes set forth in the complainants' bill of complaint; defendant therefore insists upon its rights secured by the laws of this State, and insists upon the facts aforesaid, by way of plea to the further maintenance of this suit."

That the complainants at the time, or shortly after, of the agreement for the sale or lease of the said branch road to the Atlantic & Gulf Rail Road Company that they should have asserted their claim to be enforced by a sale of Road before the Atlantic & Gulf Rail Road Company incurred the expense of purchasing the iron rails and laying them down on the track and before the transfer was fully consummated.

That neither of the defendants had any knowledge of the pretended lien or that such lien would be asserted, and that the failure to assert their lien should stop them from doing so now.

That their standing by and suffering said transfer to be made and the expense of buying and laying down the iron on said Branch Road to be incurred without asserting their lien, and to permit it now to be maintained would operate as a fraud upon the rights of both the defendants.

That the running and operating of said road is a public benefit and in compliance with the law.

That the using of the road necessitates its being kept in good order and repair, which would not be the case if left without supervision and unattended to. That it would be in a better condition to respond to any decree complainants

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may obtain by its use than by stopping its operations. That the injunction is not necessary to protect any right of complainants; that an injunction ought not and cannot rightfully be granted in this case.

That Daniel Callahan, one of the complainants, in 1866, and not long before the agreement with the Atlantic & Gulf Railroad Company was made with one Sims, sought to make an arrangement with both the defendants by which they should become possessed of the said Live Oak connection, embracing that part in Georgia as well as the part in Florida, but the terms proposed were not accepted. That during the negotiations no suggestions was made by Callahan of the pretended claim asserted by complainants, and no intimation of the said pretended lien was made or notice thereof was given to defendant, and that the complainants should now be stopped from asserting the same.

And lastly, that by the agreement with the Atlantic & Gulf Railroad Company, it was to receive for said branch road the actual cost of the same in stock of said A. & G. R. R. Co. at par. That the said consideration has been received by this defendant, and the same has been disposed of by it.

And on the same day, to-wit: on the 18th day of April, 1867, was filed the separate answer of the Atlantic & Gulf Railroad Company.

The answer admits that the Pensacola & Georgia R. R. Co. was authorized by its charter to construct the branch road as alleged.

That defendant knows nothing of the condition of said branch road when complainants took possession under said alleged contract with the C. S., and prays strict proof thereof.

That it knows nothing of any contract or agreement between the Pensacola & Georgia R. R. Co. and the C. S.,

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whereby the complainants were placed in possession for the purposes alleged.

That it knows nothing of any contract between the complainants and the C. S. in regard to the work, and labor, and material on said branch road, and prays strict proof thereof.

And avers, that if any such contract was made as alleged in complainants' bill, "that such contract was made for the purpose of aiding and assisting the said Confederate States in carrying on war, and in their rebellion against the government of the United States, and therefore was and is illegal and void *ab initio*, and cannot be enforced by this court; and that such contract being contrary to law and illegal, the said complainants ought not to have and cannot have a lien upon the said branch road for the payment of the amount they claim to be due them thereon, if such amount is due thereon from said late Confederate States."

That it appears from complainants' bill "that the work, labor and materials which they expended upon and furnished to said branch road were so done and furnished under a contract between them and Minor Merriweather, a Major of Engineers in the military service of the Confederate States of America, acting for said Confederate States in carrying on war against the United States Government and for no other purpose, as this defendant avers and alleges, and that by the laws of the United States such contract was and is void and illegal and of no force, and cannot and should not be enforced in any court."

The defendant knows nothing of the labor and materials laid out by complainants on said branch road, and prays they may be held to strict proof thereof.

That by complainants' bill it appears that they went into the possession solely under the authority of the late Confederate States, and were solely employed by the C. S., and avers that neither of the defendants were parties to said act

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of possession. That the contract was made by complainants solely with the late Confederate States and not with either of defendants. That the possession was received by complainants for an unlawful purpose; that the complainants never were in lawful possession, and all such right, if any such right they ever had, ceased and ended with the power and existence of said late Confederate States.

That complainants never did acquire any lawful lien upon said branch road.

That the defendant, is informed, and believes and avers, that on or about June, 1865, the said branch road was left by said complainants to the possession of the forces of the army of the United States, and was entirely abandoned by said complainants, and so remained until on or about the month of September, 1865, when the Pensacola & Georgia R. R. Co. re-took possession of the branch road as its own property, abandoned by the late Confederate States, and all persons claiming under it, and at that time the said branch road was not in either the actual or constructive possession of complainants, and it was daily coming to loss and detriment and daily becoming impaired in value.

That it entered into a contract with the Pensacola & Georgia Railroad Co. for the lease of said road for ninety-nine years, and is now in possession and running its cars over the same under said contract. That possession commenced on the 17th day of July, 1866, the date of the contract.

That the defendant has paid the Pensacola & Georgia R. R. Co. in part consideration of said lease, the sum of \$134,000 in the capital stock of this company.

That no lease or deed has yet been executed between this defendant and the Pensacola & Georgia Railroad Company, but claims to hold the branch road under said contract, which is annexed and made a part of the answer.

That since it went into possession under the contract it

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has expended upon said road, in work and materials, more than \$220,000—has increased the value of the road to that extent, and its responsibility to answer to complainants for any lien they may have thereon for the payment of their claim of \$37,379 69-100 as is alleged in their bill.

It denies that the use of the road by defendant will impair its value, but avers that while the trains of defendant are running over said branch road and carry mails of the United States, passengers and freight, it is necessary for defendant to keep the same in good running order and repair, and thus keep up and sustain the security to complainants for the payment of any lien they may have or judgment or decree they may obtain against said branch road. That if injunction is granted, it would weaken the security to complainants as it would not be necessary for it to keep said road in repair, and denies that the use of the road by defendant can in any way decrease its value; that there will not be ample and sufficient property therein to respond or pay any judgment or decree which complainants may obtain for their aforesaid claim.

That neither of defendants ought to be bound to pay to complainants, if in the judgment of this court the defendants or either of them, are under any obligation to make payment therefor, to a greater amount than the actual value of said labor, work and materials, when the Pensacola & Georgia Railroad Company took possession of the same, and that they should in no wise be held for the original cost, but only for the actual value as it came into the possession of defendants.

And upon information and belief the complainants have been paid by the Confederate States large amounts of money for work, labor and materials, which they allege to have laid out and expended on said branch road.

And it denies that any lease or conveyance by the said Pensacola & Georgia R. R. Co. of said branch to de-

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fendant can, or would in any way impair or injure any lien which complainants may have for their alleged work, labor and materials, and that the said liens, if any such there be, could as well be enforced by this court, whether such lease was made or not.

That if they have any such lien, they are debarred from enforcing the same against this defendant now in possession of said branch road for value and without notice of said lien, because the complainants stood by and permitted this defendant to purchase their said interest in said branch road without informing defendants, complainants held or claimed any lien, the complainants at the time well knowing that the defendant was purchasing for value.

The answer is sworn to by W. Duncan, acting President A. & G. R. R.

The cause was by consent of counsel by order of the Judge, transferred from Suwannee county to Columbia county, in equity, April 25th, 1867.

The first question presented by the answer is the plea to the jurisdiction of the court presented by the Pensacola & Georgia R. R. Co., alleging that the Leon Circuit Court has jurisdiction, because the residence of the President and the office of that company is in Leon county, and the greater part of said branch road lies in the Middle Circuit. That defendant is by law sueable only in the county of Leon, and that the jurisdiction of the Circuit Court for the Middle Circuit is ample for all the purposes set forth in complainants' bill.

It is contended on behalf of complainants that this court has jurisdiction, and that it is the proper circuit wherein the same should be brought, to-wit: in the Suwannee Circuit Court in equity.

The defendant, the P. & G. R. R. Co., insist that under and by statute of this State, Sec. 3, Thomp. Digest, page 328, the suit should have been commenced in Leon Circuit

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Court. We contend that said statute has no application to this case for the following reasons:

1st. That this is a court of general equity jurisdiction.

2d. The defendant, the Atlantic & Gulf Railroad Company, is a foreign corporation, whose agent and office is in Suwannee county, therein residing and having the office of said Company, as alleged in the bill of complainants, and sworn in the return of the Sheriff upon the subpœna in Suwannee county.

3d. The result of the plea, if sustained, would be to require two causes in equity to be brought—one in the Leon Circuit against the Pensacola & Georgia R. R. Co., and one in the Suwannee Circuit against the Atlantic & Gulf R. R. Co., thus multiplying suits about the same subject matter.

The position of the defendant, the P. & G. R. R. Co., might be well taken if it was the *sole* defendant.

The plea sets forth facts which constitute only a question of privilege in the P. & G. R. R. Co. to be sued in Leon Circuit Court.—See Russ, adm'r of Gorrie, vs. Mitchell XI Florida Reports, 80.

But in case of several defendants, as in the case at bar, the plea will not hold good.

Story in his equity pleadings, Sec. 715, says: "When the suit is brought in a superior court of general equity jurisdiction, nothing will be intended to be out of its jurisdiction except what is shown to be."

And again he says, speaking of the plea—"In point of substance it is necessary to entitle the particular jurisdiction to exclusive cognizance of the suit, that it should be able to give a complete remedy."

And the same author, at page 727, §715, lays down the rule which complainants hold decides this plea of the P. & G. R. R. Co. to be bad, in the following words: "And if a suit is instituted against different persons, some of whom have privilege and some not, or if one defendant is not amenable

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to the particular jurisdiction, a plea will not hold.”—Citing Mitf. Eq. Pl., 224, 225. And the same is laid down to be the practice in 3 Daniel’s Chancery Pl. and Prac., 653.

This court has jurisdiction of the defendant, the Atlantic & Gulf R. R. Company, and it is liable to be sued in Suwannee Circuit Court by virtue of the statute approved Feb. 12th, 1861.—See Chapter 1,116, page 63, pamphlet laws, 1860-'61, and by act Nov. 21st, 1829; see Thompson’s Digest, page 328.

The return of the Sheriff is made on said A. G. R. R. Co. by virtue of said acts and in conformity to act 1834, Thomp. digest, page 329.

No question can be raised by defendants after appearing by counsel and filing answers as to any irregularities.

The appellees hold—

1st. That the appellants are by the rule of this court not allowed in argument to insist upon any matters except such as are set forth in the petition for appeal.—Rules of court adopted in 1852. Hence the plea to the jurisdiction in the answer of the P. & G. R. R. Co. is not before the court—nor the illegality of the contract with the C. S.—nor the general demurrer, on the ground of no equity in the bill set forth in the answer under the statute of Florida is not before this court, but that they are confined to the answers and bill under their exceptions.

2d. That this appeal is substantially a rehearing of the cause, and the appeal opens the whole cause to the respondent.—Southern Life Insurance Co. vs. Cole, IV Fla., 359.

3d. That this court will grant such decree as the court below ought to have granted, if the court believes the decretal orders of the court below are not adapted to the cause as it appears of record, and by the decree of this court will decide the equities between the parties and grant fitting decree.—See the case cited by Justice Thompson, page 363,

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in IV Fla.; Southern Life Ins. and Tr. Co. et al. vs. Cole; Thompson's Digest, 449.

4th. That the facts of this case as appear by the record of the cause, do warrant the decretal orders of the court below.

5th. That the Atlantic & Gulf Railroad Company are not purchasers for valuable consideration.

Hare & Wallace's notes, leading cases in Equity 2 vol., part 1, page 45.

I propose to take up the 7th, 8th and 9th exceptions first, which are—

7th. Because it was not embraced in the notice to show cause given to defendants.

8th. Because no motion therefor was made and notice given to defendants.

9th. Because the subject matter thereof was not presented in the argument made in the court below, and no opportunity was allowed the defendants to show cause against the same, the same being granted after answer filed without notice.

This court will presume that all was done in the court below that was required to be done, in accordance with the practice and usage of courts of equity, until the contrary appears.

Appellants in these exceptions set forth surprise as a ground of reversal prayed; was there any such surprise?

Notice has been served on the defendants to appear and show cause why an injunction should not issue according to the prayer in the bill. How do they respond to that notice? They file their answers; they deny that complainants have any equity; they set up a new equity, which they say exists, to defeat the complainants; they disclose an agreement under which title claimed as a purchaser of valuable consideration, without notice so as to defeat complainants; they, by their answers, bring up the whole merits of the cause; they put the whole cause at issue; they disclose a cause

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which we say makes out our claim to the interposition of this court; they, by their own course in putting in the answers, require the court to hear all the equities in the same. They do all this. They appear and argue the whole cause fully by solicitors for both defendants, as is shown of record by the decree of the court, on a motion that injunction do issue according to the prayer in the bill.

What was that prayer? For an injunction to issue restraining them, their servants, &c., from running, using or removing locomotives and cars over said branch, or any part thereof, or in any way or manner using the branch road, until the further order of the court.

This prayer for an injunction they resisted by their answers, and because the court, by its decree, modified the relief prayed for specially, by permitting them to continue to use the road, and to report to him the receipts and expenditures, and forbid the Florida corporation, that, by its own admission, was insolvent, to turn over the proceeds of this road to a foreign corporation and allow it to go beyond its jurisdiction. In a word, because the court in that part of its decree allowed them to use the road until his further order, under such terms as the court imposed, instead of restraining them from using the road in any way. They say this was surprise; we had no notice. This is to say the *major* does not include the *minor*.

Is it surprise that the court allowed the continued use of the road on terms until his further order, instead of preventing the defendants from in any way using the same.

Was it surprise that the court decided that it had jurisdiction when they themselves do not even call its decision into question, or their appeal as to that point?

Was it surprise that the court decided that it had jurisdiction the agreement which was disclosed by them, for the first time, upon the discovery prayed for in complainants' bill,

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and when disclosed by them, on it they relied to destroy the equity of the complainants' bill, and which instrument was a fraud upon and hindrance to complainants' rights, and was in violation of law?

Was it surprise to prevent them from fully completing an illegal act partially performed and claimed as a title?

Most assuredly they could not have been surprised to their injury by that part of the decree which ordered them to show cause why a Receiver should not be appointed, because they appealed and obtained a supersedeas before the time came for them to show cause, hence that part of the decree has never been determined.

The 9th objection this court will not nor cannot inquire into; it would simply raise a question of veracity; if it is to be enquired into we say—the court must have evidence as to what constituted the questions of argument below.

We say the motion was made at the bar to get the court, if it refused the specific instruction prayed for, to grant the order and decree made.

II. I now propose to consider the 2d, 3d and 4th grounds relied upon by the appellants, to wit:

“2d. Because the same is not supported by any prayer in the bill.

“3d. Because it is not embraced in any prayer of the bill.

“4th. Because it is not warranted by the relief prayed.”

The prayers of the bill are:

1st. A decree at the final hearing of the cause for sale of that portion of the branch road (which is the subject of the suit) to satisfy the claim and lien of complainants.

2d. For account.

3d. A prayer for general relief, or rather in the words of the prayer, “such further or other relief in the premises as the nature and circumstances of this case may require and to your Honor shall seem meet.”

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4th. A prayer for injunction “restraining them, their servants, workmen and agents from running, using or running locomotives and cars over said branch road, or any part thereof, or committing any waste thereon, or in any way, manner or form using the said branch road from Live Oak Station to the Georgia and Florida boundary line, until the further order of this court.”

5th. A prayer for process to issue against defendants.

The decretal order of the court did not grant the injunction specially prayed for, except in this, where it enjoins the defendant from executing and perfecting the agreement set forth in their answers, in this respect it does grant that part of the prayer for injunction which prays that they be enjoined “from *in any way, manner or form using the said branch road.*” By the answers they show they have contracted as to its sale or lease; both parties insist that one has the right to *use the road*, not simply to run it, but to sell or lease it, and the other to take and require the sale or lease to be executed so that the defendant, the Atlantic & Gulf Railroad Company, may *use the road free of encumbrance* or hindrance from any, and claims this right to so “*use*” the branch road by virtue of this agreement. This the court enjoins, thus to that extent granting the injunction as to that particular use being made of the road. Therefore we hold, that the injunction enjoining the execution of the contract or agreement is embraced in that part of the special prayer for injunction.

Next, we hold the orders of the court and the interlocutory decrees are embraced in the prayer for general relief. Story's Eq. Pl., §40, 41. See note; Mitford's Chancery Pleadings, page 39, 41. See cases cited in note.

Where the prayer is in the disjunctive, relief will be granted, though inconsistent with the specific relief prayed when qualified by the equity of the case made. See cases

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cited in note on page 41, Mitford's Chancery Pleadings, 2 Paige, 396, 1 S. and Marsh; 1 Hawk.

III. I now propose to take up the 12th exception, as this relates to the class of exceptions above stated.

"12. Because the order and decree appealed from orders the defendants to show cause why a Receiver should not be appointed, which is not conformable to any allegations or prayer in the bill."

Now, this order to show cause why a Receiver should not be appointed, was made after answers filed, after all the merits of the cause upon bill and answers had been fully argued, after all the equities had been disclosed pro and con.

We hold the true rule to be this:

If the facts of the case authorize it, the court will appoint a Receiver, although there is no prayer to that effect in the bill. 3d Danls. Ch. Prac., p. 1974.

IV. I now propose to take the 14th exception, to wit:

"14th. Because the answers of the defendants completely overcame and denied the alleged equities in the bill on which said order depended or assumed to have founded."

Take for granted for argument that this exception is, yet we hold this is no ground for the reversal of the decree of the court below, but upon the contrary we hold the rule to be, that the granting of the injunction prayed for in the bill, or the decretal order, rested in the sound discretion of the Chancellor, to be governed by the nature of the case. *Carter vs. Bennett*, 6 Fla., p. 215. See p. 236; *Allen vs. Hawley*, 6 Fla., p. 169.

Judge Dupont in that case said, "But there is no flexible rule to this effect, for the granting or continuing injunctions must always rest in the sound discretion of the Court, to be governed by the nature of the case. This doctrine has been fully recognized and authoritatively established by this court."

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This question then is not subject to the conflicting authorities of other tribunals; it has been authoritatively settled in this State to the reverse of the 14th exception taken by the appellants.

V. I now come to the 1st, 5th and 10th exceptions, to wit:

"1st. Because the said order and decree is not based upon or sustained by any of the allegations of the bill.

"5th. Because it is not sustained by any of the alleged equities set out in the bill.

"10th. Because the same is not sustained by the principles of law or equity applicable to the case."

We contend that the facts of the case warranted the decretal orders of the court, that to ascertain this the court will consider the merits as disclosed in the bill, and in the words of Justice Forward, "the main question is whether the bill makes out a *prima facie* case."

The doctrine of enquiring into the merits of the case so that the chancellor may exercise that sound discretion vested in him by law, has been established by this court, and does not require authorities from us to sustain it. *City of Apalachicola vs. The Apalachicola Land Co.*, 9 Fla., p. 347.

It is further contended that in the case at bar the granting of the injunction is further governed by the statute of Florida, 1860, 1861, page 46, which is mandatory, and prescribes that where the affidavit is made as required by that act, the chancellor shall receive *ex parte* evidence of the truth of the statements of the bill, &c.

The bill of complainants was filed and the affidavit thereto drafted under this statute. We contend that it is not in the power of a defendant by filing his answers to prevent the complainant from availing himself of the first section of the act.

Under the 1st section of this act there is of record the affi-

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davits of eight witnesses to support the allegations of the bill and affidavit.

It is contended on behalf of appellees that the granting of the injunction prayed for in the bill *rests in the sound discretion of the court, to be governed by the nature of the case*, even though all the equity of the bill is denied by the answers.

Chancellor Kent in *Roberts vs. Anderson*, 2 John. C. R. says: "That even where all the equity of the bill is denied by the answer, it is not, of course, to dissolve the injunction, as the *granting* and continuing an injunction rests always in the sound discretion of the court *to be governed by the nature of the case*."

In *Carter vs. Bennett*, 6 Fla., p. 215 and 237, the court held, "when all the equities of the bill are denied by the answer, it is not, of course, to dissolve the injunction. The granting and continuing of injunctions rests in the discretion of the court, to be governed by the nature and circumstances of the case."

In the case of *Allen vs. Hawley*, 6 Fla., p. 168 and 169, the court says: "The injunction in this cause was granted before answer, and the general rule of practice in such cases is to dissolve the injunction, where the answer denies all the circumstances upon which the equity of the bill is founded," and cites several authorities. Judge Dupont then goes on to say: "But there is no inflexible rule to this effect, for the granting or continuing injunctions must always rest in the sound discretion of the court, to be governed by the nature of the case."

This doctrine has been fully recognized and authoritatively established by this court.

Citing *Carter vs. Bennett*, *ibid*; *Poor vs. Carlton*, Summer R., 70; *Bank of Munroe vs. Schemerhorn*, 1 Clarke R., 303.

The position taken there by complainants is not an open

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question in this State. In the language of the present Chief Justice, it is "fully recognized and authoritatively established" by the Supreme Court of this State.

2d. It is contended that on an application for an injunction, a Chancellor may go into the consideration of the merits as disclosed in the bill.

In IX Fla., page 347, in the case of the city of Apalachicola vs. the Apalachicola Land Co., Judge Forward delivered the opinion of the court. He says: "The main question is, whether the bill makes out a *prima facie* case—such a case as require the Chancellor, on the application for said injunction in the exercise of legal discretion, according to the rules of equity, and good conscience, and practice of the court to grant said injunction; or in other words, whether the Chancellor erred in refusing said injunction. The rule of law is, that on the application for an injunction, a Chancellor may go into the consideration of the merits as described in the bill, and which are intrinsic and dependent upon its express allegations and charges," and cites *Rose vs. Hamilton*, 1 Dess., 137.

The second position then is likewise determined and established by the Supreme Court of this State.

3d. It is contended that in the case at bar, the complainants have the right to introduce *ex parte* evidence before the Chancellor of the truth of the statements of the bill and the accompanying affidavit.

By the 1st Sec. of "an act to enlarge and define the jurisdiction, and to establish certain rules of practice in the Courts of Equity of this State," see pamph. Laws 1860, p. 46, Chap. 1,098; it is provided—"That in all suits in equity in this State, where summary process by injunction or otherwise shall be prayed, and the bill justifies such process, and affidavit shall be made of the truth of the statements of the bill, and that the complainant is unable to give bond of indemnity or other security, the Chancellor shall receive *ex parte*

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evidence of the truth of the statements of the bill and of the accompanying affidavit; and if they shall appear to be true, shall grant such process without requiring such security."

The bill of complainants was filed and the affidavit thereto drafted under this statute. There is no discretion in the Chancellor, but in the words of the statute—"he *shall* receive *ex parte* evidence of the truth of the statement of the bill and of the accompanying affidavit."

The statute is mandatory, and was intended, as its title describes, to "enlarge the jurisdiction" and to "establish" certain rules of practice in this State. Its object was to aid the Chancellor in exercising that sound discretion to be governed by the nature of the case in granting or dissolving injunctions, and by prescribing statutory rules of practice in equity and "enlarging its jurisdiction," to further aid the Chancellor in inquiring into the merits of the case made out by the bill, on applications for granting the injunction heretofore "authoritatively" established by the Supreme Court, to be the judicial practice and policy of this State. And, further, to deny none the equitable relief secured by injunction, because of their poverty, and at the same time to secure the defendant from the granting of the injunction on the sole affidavit of complainant, where no security against injury was given by bond if complainants. In other words, the Chancellor shall receive *ex parte* testimony of the truth of the bill, and if true, the relief prayed for shall be granted by injunction, be complainant ever so poor.

The 2d Sec. of this act provides for cases when the *injunction has been granted*, and the answer comes in, and after answer filed motion is made that the injunction shall be dissolved.

That is not the case at bar, which is, the answers, are filed *not to dissolve* the injunction but to *prevent the granting of an injunction*.

The statute does not provide for such a case, and we con-

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tend that it is not in the power of a defendant, who has been served with notice to appear and show cause why an injunction should not be granted by filing his answer, to prevent the complainant of availing himself of the 1st Sec. of this act.

But if defendant desires to avail himself of the 2d Sec., the better practice seems to be that he should resist the granting of the injunction, and if granted, file his answer and then apply to dissolve the injunction immediately, and then proceed under the 2d Sec.

That the statute does not provide for the case at bar, where the answers are filed before the granting of the injunction, and to resist the prayer for said writ, we contend is clear.

Under the 1st Sec. the complainant has presented to the Chancellor the affidavits of eight witnesses, to sustain the statements of the bill and of the accompanying affidavit.

It is not contended that the court will commit itself to points or questions that may arise at the final hearing.

4th. We contend that the nature of this case presents such an equity and exhibits such facts in the complainants' bill, whose statements are sustained by the *ex parte* evidence, as to require the Chancellors in the exercise of a sound discretion, to grant the injunction prayed for.

1st. In considering the motion for the granting of the injunction, the court will only look to the facts that are responsive to the bill, and will presume against defendant when he has not answered what he ought to have answered. *Young & Bryant vs. McCormick*, 6 Fla., page 369; citing *Moore vs. Jerrill*, 1 Kelly, 7; *Jones vs. Lanely*, 2 Ired. Equity, 278; *Dalrymple vs. Shepard*, *ibid.*, 153, 3 Ired. Equity, 153, 1 *Eden Inj.* (by Waterman) 146.

2d. Where a new equity is set up by the answer, to avoid that set up by the bill, the court will not regard it on the

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motion.—Younge & Bryan vs. McCormick, 6 Fla., 369; 3 Ired. Equity, 170.

The P. & G. R. R. Co. in their answer admit that they made a contract with the C. S. and its authorities, whereby the C. S. went into possession for the purpose of completing said road, and by whom complainants were put into possession for the purposes aforesaid, (see the answer), but attempt to evade this by setting up an alleged violation of said contract by the C. S. entering into the agreement set forth in exhibit "A" with the Florida Railroad Co.

They show no steps taken by them to enforce their rights. The court will presume against them for not exercising legal rights, if any they had.

We contend that part of the answer makes them privy to the contract between complainants and the C. S.

3d. The claim of complainants is resisted by the A. & G. R. R. Co. as being illegal and not capable of being enforced in any court, on the ground that it was a contract entered into to aid the C. S. in its rebellion, and therefore in violation of the constitution and laws of the United States.

We contend that such a defense cannot be set up by defendants, most assuredly by the P. & G. R. R. Co., because by their answer they admit they entered into a contract with the C. S., relative to the completion of this road, and rely upon a breach of the contract by the C. S., nor by the A. & G. R. R. Co., because *if the position was true*, it is for the U. S. to avail themselves of it, and not the defendants.

The right of Spratt & Callahan to their retention and possession of such road could, were this be true, be only taken from them by the judgment of a court of the U. S., for aiding and assisting the rebellion, under the acts of Congress. That judgment could not be obtained, because Spratt & Callahan have been pardoned, which pardon is on file in this case.

But it is contended, that until the complainants are de-

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prived of their property, to-wit: the work, and labor, and materials expended on the road, by the judgment of a court of competent jurisdiction, in favor of the U. S., the complainants cannot be estopped by that defense from relief in equity.

Further, it is contended that complainants did have a legal right to make such contract at the time.

The leading case on this subject, determined by a full bench of the Supreme Court of the U. S. in 1862, (see *Price Cases*, 2 Black, U. S. S. C. Reports, page 635,) established the doctrine. (See page 669.)

1st. That it was civil war and not rebellion.

2d. That a civil war is never publicly proclaimed *eo nomine* against insurgents—its actual existence is a fact in our domestic history, which the court is bound to notice and to know.

3d. *Civil war existed* and hostilities might be prosecuted on the same footing as if those opposing the government were foreign invading the land.

4th. Each party is deemed a belligerent nation, having the sovereign rights of war—2 Brown, U. S., *ibid.*, 669; *Santissima Trinidad*, 7 Wharton, 337; 3 Binn., 252.

The court differ *as to the time when the civil war commenced*. The minority held that insurrection, and not civil war, existed up to the date of the act of Congress 13th July, 1861, but that civil war was declared to be in existence by that act, and that the civil war, thus by Congress declared, carried with it belligerent rights.—See Black. C., 4 vol., §77. See the authority in Vattel above cited.

Hence, we contend that the C. S. had belligerent rights, and that the C. S. were empowered to do all acts in conformity to civil war, has been solemnly determined by the Supreme Court of the United States, and is a full answer to that part of defendants's answer, and proves that the contract alleged in complainants' bill was a legal contract.

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But suppose that it was not the case, then we hold that there is an *implied contract* created by law between the Pensacola & Georgia R. R. Co., they having received the use and benefit of complainants' skill, work, and labor, and materials, furnished and expended in the improvement and enhancing the value of said branch road by complainants' labor. The law raises an implied promise on their part, to pay to the complainants the just compensation for said benefit received by them.

Again, even if this were not so, we hold the rule to be this: That in equity, the general maxim of *pari delicto*, &c., does not always prevail, circumstances of the *parti* case often form exceptions, and when it is necessary relief will be granted.—Bellamy vs. Bellamy, 6 Fla., 103.

Eastbrook vs. Scott, 3 Vesey, Jr., 456. In that case it was held "that the bill showed that the bonds were a fraud upon the creditors." The defendants admitted it, yet the bonds were ordered to be delivered up.

Austin's adm'r. vs. Winston's ext'r, 1 Hen. & Man., 33; Hill on Trustees, 164; Williams vs. Avant, 5 Iredell, 50; 4 Randolph's Reports, 372; 8 Leigh's Reports, 512; Hughes vs. Orchard, 1 Wallace, 73.

We hold it would be against all equity to allow the defendants who, during the war, followed the C. S., and were loud in their declarations of support to that cause, to now claim the use and benefit, and take to themselves the work, labor, skill and materials of complainants, by which their road was and is vastly enhanced in value, on the ground of the disloyalty of the complainants to the United States.

It is well said, corporations have no souls; if there was any doubt of the fact, this position assumed by these Railroad Companies to defeat "the laborer of his hire" would settle the question.

They are in the same status as to the war as complainants.

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See the case of the Venice, page 274, 2 Wallace, and Mrs. Alexander's case, 2 Wallace, page 419.

We hold that complainants have an equitable lien on the branch road from Live Oak Station to the Florida line, for their skill, work and labor expended thereon, and for the materials furnished in improving and completing the same; and that they had a right to possess and retain said road until compensation for the same is made.

Judge Story defines this equitable lien to be "not in strictness either *a just in re* or *a jus ad rem*, but it is simply a right to possess and retain property, until some change attaching to it is paid or discharged. It generally exists in favor of artisans or others, who have bestowed labor and services upon the property in its repair, improvement and preservation."

Again he says: "It is often created and sustained in equity where it is unknown in law."—1 Story Jurs., §506; Webb's Lyon, 5 Ire. Eq., 67.

Judge Story says in 2 Story, §1,237: "But courts of Equity have not confined the doctrine of compensation, or lien for repairs and improvement, to cases of agreement, or of joint purchases; they have extended it to other cases, where the party making the repairs and improvement have acted *bona fide* and innocently, and there has been a substantial benefit conferred on the owner, so that *ex aequo et bono*, he ought to pay for such benefit. So if the true owner stands by and suffers improvements to be made on an estate, without notices of his title, he will not be permitted in equity to enrich himself by the loss of another; but the improvements will constitute a lien on the estate."

The maxim, "*jure natura equum est, neminem cum alterius detrimento et injuria fieri locupletum.*" See also 2 Story, §1239.

It is laid down as a general doctrine of the civil law, "that those whose money has been laid out on improve-

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ments of an estate, such as making a plantation, or erecting buildings upon it, or augmenting the apartments of a house, or for other like cause, have by civil law a privilege upon those improvements, as upon a purchase with their own money." See 2 Story §1236, as to money expended by one of joint purchasers for money expended in repairs and improvements, having therefore a lien on the land.

I use the language of Judge Law, counsel for plaintiff in error in Collins vs. The Central Bank, 1 Kelly, 452.

"It was our work, labor, money and materials which conferred its value on the road."

"Receiving the benefits of these improvements, they are bound equally with the owners to pay for them. This is the highest equity and the highest morality."

The justly deserved high reputation and position at the bar of Judge Law, and the fact that he is counsel on the other side of this case, induces me to give the above as authority, especially as in the case of 1 Kelly he was sustained by the Supreme Court of Georgia.

We hold that the rights of complainants are founded in natural justice. Judge Warner in delivering the opinion in Collins vs. The Central Bank, 1 Kelly, at page 458, says: "It was not intended to violate that principle of *natural justice* which exists in favor of those whose labor constructed the road and who furnished materials and equipments therefor."

Courts of equity treat the lien as a *natural equity*, having its foundation in the earliest principles of courts of equity. 2 Story, §1220.

Now, the answers do not deny the work and labor and materials furnished, as alleged in complainants' bill; and the statements are proven in this respect to be true, by the evidence of the engineer of the C. S., J. M. Fairbanks, and by that of Mr. Wells, the superintendent of Spratt & Callahan, who had charge of the work, and under whose personal

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superintendence it was done, both give the value and depose as to its correctness. The chief engineer of the Atlantic & Gulf R. R. Co. deposes as to the work being done by complainants and as to its value, and in the value he is sustained by the deposition of an adept—other depositions proved the work to have been performed by complainants.

The allegations in complainants' bill as to their never having voluntarily surrendered the possession of the road is sustained by the affidavit of the engineer in charge of C. S. at the time, and Wells, the superintendent, deposes that at the time of the surrender, complainants had some fifty or more hands at work on the road, and that they were not removed until *after* the surrender.

The insolvency of the Pensacola & Georgia Railroad Co. is not denied by the answer, nor that the complainants are without relief, unless the demands for compensation shall be satisfied out of said branch road.

This is not a case where the defendant has a right to prefer creditors, hence the authorities where a court of equity refused an injunction on the ground of insolvency, has no application to this case, as they are all predicated on the right of the defendant to prefer creditors.

In the case of Yonge vs. Bryan, 6 Fla., 369, where the court granted a writ of injunction to enjoin the collection of the purchase money of land, on the ground of defective title after the vendee had possession, one of the grounds in that case was, "that defendant is insolvent and unable to respond to damages in case of recovery of warranty." The court there say, "the defectiveness of title to part of the property, and the inability of defendant, through insolvency, to compensate the deficiency on the grounds of equity set forth by complainants, and are sufficient of themselves to entitle them to the injunction," although the answer in that case alleged "that they are sufficiently protected by warranty."

The defendant attempts to evade the equities of complain-

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ants' bill by setting up a lease, and say the Atlantic & Gulf R. R. Co. is a purchaser for valuable consideration without notice. The agreement itself shows this to be unfounded. On its face it shows to have been an agreement entered into between the Presidents of both companies in the city of Savannah, Georgia.

It is in violation of law and the policy of this State, and after the agreement was entered into, the Legislature refused to allow the road to be sold, except for cash, and prescribed what disposition should be made of the money, to wit: The extension of the railroad from Quincy, West. The 3d article of the agreement shows the Presidents knew at the time that there was no legal authority for the act contemplated, and it was therein covenanted that the Pensacola & Georgia Railroad Co. should at the next session of the General Assembly of the State of Florida, cause the conveyance to be authorized by statute.

This was denied by the legislature and the act above quoted passed. See Pamphlet Laws 1866-67, page 45. The answer shows that in violation of said declared policy and law of the State, the defendants have attempted for stock in the Atlantic & Gulf R. R., under the name of a lease, to violate the law and to dispose of said branch road as fully as if by absolute sale and conveyance of the franchise, rights and privileges, &c., of the P. & G. R. R. Co. therein. See 4th sec. of agreement; and that by virtue thereof the Atlantic & Gulf R. R. Co. went into possession and expended thereon large sums of money, and are now running and using the branch road.

We hold that the Atlantic & Gulf Railroad Company never were legally in possession, that all their acts and doings under said agreements are in violation of law and the rights of complainants.

That said agreement is a fraud on complainants' rights

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and cannot be executed in any court in this State, and should be enjoined by a court of equity.

That the power and authority of the Pensacola & Georgia Railroad Company is curtailed by their charter and the Internal Improvement acts of this State, and from them justly derived its authority, and that agreement, and the rights of defendants thereunder so claimed by the Atlantic & Gulf R. R. Co. is in violation of said acts and charter and a fraud on complainants' rights. See Florida, Atlantic & Gulf Central R. R. Co. vs. Pen. & Ga. R. R. Co., 10 Fla., 147.

In that case the court at page 170 say: "That it is the right of an individual or corporation having vested rights to enjoin another corporation where the damage about to be done is of a permanent and irreparable character, and especially where the defendants seek to do it under cover of a charter." 1 American Railway cases, 278. In that case the Judge, speaking of the power and priority of granting an injunction, says: "This is more especially a ground of interference, when the party complained against proposes to exercise a public authority, and where the claim is to appropriate *the property* or franchise of the complainant to a purpose claimed to be public, and where the plaintiff denies and contests the right of the defendants to exercise such power."

In the case of Agar vs. The Regent's Canal Company, Cooper's Eq. Repts., 77, "the Lord Chancellor admitted that the plaintiff might have lain by and rested on his legal rights, and brought trespass, but he was also at liberty to come into chancery, in the first instance, for a preventive remedy."

In Woodward vs. Leily, 36 Penn. State R., 437, it was held, "a contract whereby the owner of land leases the same for a period of five years, and the lease stipulates to erect a building thereon during the first year of the term, a building of the value of \$3000, the lessor covenanting in

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addition to the annual value of the premises (which is fixed at \$3000) to pay to the lessee when the building shall have been completed, the sum of \$1,500, although in one aspect an improvement, lease is *nevertheless* as to mechanics and material men, a contract for the erection of the building, payable partly in money and partly out of the profits of the land, and the estate of the lessor is bound by the mechanics' lien," cited in vol. 21, U. S. Digest.

In the case of the People vs. New York, 32 Barbour R., 102, it was held, that "a corporation proposing to make a ten years' lease of an important ferry in violation of law, may be restrained by injunction."

We hold that the P. & G. R. R. Co. and the Atlantic & Gulf R. R. Co. are confederating together to the injury of and in violation of the rights of complainants under the agreement.

The strict construction of Legislative grants to a corporation has become a settled doctrine of American law, which is applied with more stringency *where private rights are to be interfered with*, or important functions of Government are to be abridged by them. Pierce on American Railroad Law, page 9.

In the act of 1866, amendatory of the character of the P. & G. R. R. Co., the sale is required to be made for cash; there is no power therein conferred to carry out this agreement whereby the defendants claim to deprive complaints of their equitable rights.

The rule of law on this subject is laid down in Pierce on American Railway Law, at page 10, to be "the restrictions on the powers expressed in the charter are to be enforced against the company although the effect is to render the powers worthless; and if the powers cannot be executed without disregarding the restrictions coupled with them, they cannot be executed at all."

In England the uniform decisions hold that a railroad

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company cannot lease its road to another company. Pierce A. R. R., p. 397 and 498. The same author says at page 402: "The English decisions affirming the invalidity of the contracts of the company by which it attempts to transfer its corporate privileges and responsibilities have been incidentally approved in this country. See the King vs. the Severn & Wye R. Co., 2 B. & Ald., 646; Reg. vs. The Eastern Counties R., 10 Adol. & Ellis, 531; Reg vs. South Wales R. Co., 14 Adol. & Ellis, (N. S.) 902; Clark vs. Washington, 12 Wheaton, 46, 54; Winchester & Lexington Turnpike R. Co. vs. Vermont, 5 B. Munroe, 1; Arther vs. Commercial & R. R. Bank, 394; Pierce vs. Emery, 32 N. H., 507, cited in note; Pierce Am. R. R. Law, p. 515 and 517; Redfield on Railways, §205. See note on page 475; Pierce American R. R. Law, p. 85, 88, 89, and cases there cited to show that injunctions have been issued by courts to restrain corporations from executing acts not authorized by its charter and therefore unlawful.

The case of Dunn vs. Worth, 24 Mo., 493, cited in Redfield on Railways, §123, is not in point; that was a case where a lien was claimed under the statute of Missouri. We do not claim there is any statutory lien. The court decided that justly, but it did not decide the question at bar. The equitable right to restrain the possession until compensation is made for the work and labor; to decree adversely to this would be, as we have already shown, to decree against a right founded in natural justice.

The statements of the bill that defendants had notice is sustained by the affidavit of Joseph B. Stone, who says: "he was then chief engineer of the Atlantic & Gulf Railroad Company," (one of the defendants) "and that while acting as such engineer he had the means of knowing that said connection Railroad was built by Daniel Callahan & James W. Spratt." This is the sworn statement of the chief

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engineer of the defendant, the Atlantic & Gulf R. R. Co., at the time when complainants were building said road.

And the affidavit of Mr. Wells, the superintendent in charge of the work and road for complainants, tells of Mr. Latrobe, the former chief engineer of the P. & G. R. R. Co., removing tools of that defendant for deponent to work on the bridge, and that he (deponent) himself returned the tools to the Pen. & Ga. R. R. Co.

Again, the law presumes they had notice. 1st, it is shown that in October, 1866, a suit was brought at law against the Pen. & Ga. R. R. Co. on an implied promise to pay for the work and labor on this very portion of the branch road for the recovery of that claim herein applying to be enforced and on the like contract seeking relief in equity. See second count in the declaration in exhibit A, in complainants' bill, and 3d and 4th in ——— for the wrongful conversion. The doctrine of "*lis pendens*" applies here.

And it will be remembered that this suit was brought and was *pending prior* to the meeting of the General Assembly of 1866, at which the Pen. & Ga. R. R. Co. attempted to have their charter amended to enable them to carry out their *secret agreement* with the Atlantic & Gulf R. R. Co., and which was denied by the Legislature, but was amended and shaped into the present statute above quoted, for the amendments hereto made by the Senate of Florida. See Senate Journal 1866, p. 161, 154, 181, 195.

Again, the answer of the Pen. & Ga. R. R. Co. wherein it alleges the various matters between it and the agent of the C. S. relative to the Fla. R. R. Co., proves they had notice. The law is laid down in Soule vs. Downes, 7 Cal., 575, cited in annual Digest, 1859, vol. 19, page 453, that "those dealing with property during the progress of building on it are charged with notice of the builder's lien."

And again, in the answer of the Pen. & Ga. R. R. Co. where they attempt to avoid complainants' rights by

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saying "*that in case defendant had no authority or power to prevent the complainants from executing the contract they had made with the Confederate States, through their agent, with respect to this branch, and if it had attempted it, the complainants would have heeded its remonstrances or objections as much as the Confederate States heeded its objection to the contract with the Florida Railroad Company and their using the branch road under said contract.*"

Herein the Pen. & Ga. R. R. Co. not only admit they knew complainants were executing said contract and performing work and labor and furnishing materials in the improving and completing of said road, but that the defendant, the Pen. & Ga. R. R. Co., stood by and made no objections thereto, nor made any remonstrances to Spratt & Callahan, but gave an excuse for their silence.

We hold that in the part of their answer they had admitted the allegation of complainants' bill, and by their own admission of remaining silent while complainants were making repairs and improvements, they show their responsibility to compensate complainants for said work and labor and materials from which they have derived great benefit.

The owner who stands by and sees work done for another on his land without disclosing his interest, is subject to the mechanics' lien." Donaldson vs. Holmes, 23 Ill., 85, cited in U. S. D., 21, page 355, and see 2 Story Eq. Juris., §388 and 385. But on the other hand it is shown in the answers themselves that complainants did not have notice of the unlawful agreement sought to be entered into by the defendants. The exhibit shows it to be an agreement entered into between the Presidents of the Pen. & Ga. R. R. Co. and the Atlantic & Gulf R. R. Co. at Savannah: the law required three months' notice to amend the R. R. Charter, the public notice required by the constitution, made before the act of 1866, amending the Pen. & Ga. R. R. Co. Charter, showed complainants that they did not have at the time

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any such power; but that they would apply for such power, and the act shows what the legislature authorized them, the defendants, to do. The complainants call upon them to discover what they have done. The agreement is disclosed by the answers, as they were compelled to do, and there is discovered the illegal contract under which the Atlantic & Gulf R. R. Co. claims, and by virtue of which defendants attempt to deprive complainants of that equitable relief to which they are entitled: to enforce their right to be compensated out of the branch road for the money, work, labor and materials expended thereon by them, and to prevent the defendants from completing the fraud attempted upon the rights of complainants.

Hence, the nature of this case we contend is such that required the Chancellor, in the exercise of a sound discretion, to grant the suit prayed for, and enjoin the defendants from continuing the irreparable injury and mischief to complainants' rights.

The authorities relative to a refusal to grant injunctions in cases of doubtful title are not applicable to the case at bar. All these cases are predicated on the principle that a court of equity will not enjoin waste alleged by one whose title is doubtful to the property upon which the waste is alleged to be committed. That before the chancellor will grant an injunction to stay waste, the complainant must first exhibit a title in himself.

But this not a case of waste, nor is it a case of doubtful title.

The complainants allege no title in themselves, on the contrary they disclaim it and call upon the court to make the property respond to their claim, be the owner whoever he may. They allege no title in themselves, but a right to possess and retain the branch road until compensation is made for the money, work and labor and materials expended by them in its repair, erection and imparting an additional

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value to the road, and call upon a court of equity to enforce that right to compensation by preventing the defendants from using or molesting or interfering with said road until they are paid; and this right founded in natural justice, to-wit: to be compensated for their work and labor shall be satisfied by those to whom benefit has accrued.

The answers exhibit the necessity for the exercise of the power of the chancellor to prevent defendants from not only using the road and depriving complainants of the right of retention until compensation is made, but to prevent them from completing a contract in violation of the law of the land, and the rights of complainants and in fraud of their equitable lien or right to compensation out of the product of their labor to which only they can look for compensation, owing to the insolvency of the Pen. & Ga. R. R. Co., not denied by the answer, showing the general property of the company to be encumbered with prior liens.

We hold that where a right is given to retain, a court of equity will enforce that right. We have already shown this is an equitable right and founded in natural justice.

The principle upon which courts of equity act on the lien of lands is, "that a person who has gotten the estate of another, ought not in conscience, as between them, to be allowed to keep it, and not to pay the full consideration, money." 2 Story, §1219.

Again the same author says, *ibid.*, §1216 *a*: "Courts of equity will give aid to the enforcement and satisfaction of liens in a manner utterly unknown to law."

In *Brent vs. Bank of Washington*, 10 Peters, 613, Mr. Justice Baldwin, delivering the opinion of the Supreme Court, said, "Whatever may be the defects of a *bona fide* creditor, equity will protect him in their enjoyment. Its action is on equitable rights by equitable remedies or legal rights, for which the law provides no remedy, or none so adequate as equity, so beneficial or complete."

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In *Collins vs. Central Bank*, 1 Kelly, 457, the court say, "the convenience of commerce and natural justice are on the side of liens, and therefore, of late years, courts lean that way."

It is contended that Courts of Equity favor equitable liens to the exclusion even of judgment liens. See the numerous cases cited in the opinion of the Chancellor in the matter of *Howe*, 1st Page, 127.

In *White vs. Carpenter*, 2 Page, 266, the Chancellor reaffirms the doctrine laid down in "the matter of *Howe*," and says, "at law a judgment is a general lien upon all the legal interest of the debtor in his real estate, but in Chancery that general lien is controlled by equity, so as to protect the rights of those who are entitled to an equitable interest in the lands or proceeds thereof."

Again we hold that the complainants have a lien by usage; they are railroad contractors. Judge Story says, "liens generally exist in favor of artisans and others, who have bestowed labor and services upon property in its repair, improvement and preservation." 1 Story's Eq., §506; *Chase vs. Westmore*, 5 M. & Sel., 180.

Every bailee has a lien who, by labor or skill, increases its value. *McIntyre vs. Carver*, 2 Watts & Sergt., 392; *Grinnell vs. Cook*, 3 Hill, p. 491; *Baudor vs. Barnett*, 54, C. L. R., page 531.

Ownership is not material in cases of general lien. Lord Campbell then said, "I think it equally exists, the party claiming it having acted with good faith, although they turn out to be the property of a stranger."

It is a general doctrine that a party having a lien has a right to possess himself of it when he has been fraudulently deprived of the possession. 9 C. L. R., 1 *Carrington & Payne*; *Wallace vs. Woodgate*, 477; 32 C. L. R., 7 *do. do.*; *Decis vs. Stockly*, Ox. 3; *Benedict vs. Murray et al.*, 301, 322.

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A delivery without his consent does not affect his rights. *Partridge vs. D. College*, 5 N. H., 288, nor by a sale and delivery without his assent. *Ibid.*

In equity they exist independent of possession. *Ex parte Foster*, 2 Story, 131.

We hold that Courts of Equity will follow the law in principles so well founded in natural justice.

As to liens, by the use of trade, both the fact and the extent of the usage are matters of evidence. 3 *Parson on Contracts*, (ed. 1864,) page 239.

This statement of alleged lien in complainants' bill is sustained by the affidavit of David Wells.

Hence we say that the decretal orders of the court below should not be reversed, or that, in case of their reversal, this court should grant us such equitable relief, as the record discloses our right to be compensated for the services rendered and materials provided out of said branch road, that such rights are founded in the highest equity and highest morality, which will be enforced by the equitable remedies in the power of this court to bestow.

Chief Justice DuPont being disqualified by law to sit in this case, Hon. B. A. Putnam, Judge of the Eastern Circuit, was called in and sat in his place.

DOUGLAS, J., delivered the opinion of the court.

In this case a bill was filed in the Circuit Court of Columbia county on the 3d day of April, 1867, by James W. Spratt and Daniel Callahan, asking, among other things, that the Chancellor would grant an injunction to restrain the defendants, the P. & G. R. R. Co. and the A. & G. R. R. Co., from running locomotives and cars over the branch road from Live Oak Station to the Georgia and Florida boundary line, or any part thereof, or committing waste thereon, or in

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any way or manner using the said branch road from Live Oak Station to the Georgia and Florida boundary line, until the further order of the court. The complainants also pray an account may be taken of the amount due them for work and labor and materials, and that the court would decree a sale of the said branch road to satisfy their claim and demand, when ascertained.

There is also a prayer for such further or other relief as the nature and circumstances of the case may require.

The material statements in the bill necessary now to be considered are:

1. That the said branch road from Live Oak Station, in Florida, to the Georgia boundary line, was placed in the possession of the complainants by the military authorities of the Confederate States for the purpose of altering, improving and repairing the same, under an agreement between the Pensacola & Georgia Railroad Company and the Confederate States.

This statement is denied by the answer of the P. & G. R. R. Company.

2 That the complainants went into possession of said branch road under a contract with one Minor Merriweather, a Major of Engineers in the military service of the Confederate States, and that the said Minor Merriweather then placed the complainants in possession of the said branch road by the authority of the P. & G. R. R. Co., one of the defendants, under a contract between the P. & G. R. R. Co. and the Confederate States.

This allegation is denied in the answer of the P. & G. R. R. Co., one of the defendants.

3. That the complainants entered into the possession of said road under their contract with the Confederate States, and performed certain work and supplied materials to the amount of \$37,379.60.

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To this allegation of complainants the defendants say "they know nothing."

4. The bill further states, that the complainants have a lien on each and every portion of said branch road for the payment of said sum of \$37,379 60-100, and that the said lien has never been lost or surrendered by complainants.

This lien is denied in the answers of the defendants.

5. That the P. & G. R. R. Co., without the consent of, and in violation of the rights and lien of complainants, took possession of said branch road and refused to pay the claim of complainants.

To this allegation the defendants reply, denying that they took possession of said road, but that the same was turned over to them by the military authorities of the United States, after the close of the late civil war, and that the United States took possession of it as captured and abandoned property.

6. That since the P. & G. R. R. Co. took possession of said road, they have sold or leased the same to the A. & G. R. R. Co. for a consideration of many thousand dollars.

This is admitted in the answers and the amount of the purchase money, and the funds in which it was paid, is fully set forth.

7. That the defendants are running and using said road to the detriment in value of the same, and to the injury of the lien, and debts and claims of the complainants.

This is denied in the answers, and it is averred that the value of said road has been increased more than double since it went into possession of the A. & G. R. R. Co., by the expenditure of large sums of money in repairs and improvements.

8. The bill alleges that the P. & G. R. R. Co., one of the defendants, is insolvent.

This is not denied by the answer.

9. That the complainants have instituted their action at



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law in Leon Circuit Court against the P. & G. R. R. Co. for the recovery of their said debt, which suit is still pending and undecided.

This is admitted in the answer of the P. & G. R. R. Co.

There are many other statements and allegations in the bill, which at this time and for the purpose of deciding the questions properly raised, it is unnecessary to notice.

The argument at bar took a wide range, embracing questions proper to be considered on a final hearing, and was characterized, both for complainants and defendants, by marked ability and learning. If the case was before us on final hearing, we should feel it our duty to consider and decide all the points raised by the bill and answer and argued at bar. In the present condition of the case, the record presents an appeal from an interlocutory order of the court below from granting an injunction, and to the propriety of granting an injunction we shall chiefly direct our inquiries, leaving other questions to be settled when they properly arise.

The object and purpose of an injunction is to preserve and keep things in the same state or condition, and to restrain an act, which if done, would be contrary to equity and good conscience; and it is the appropriate relief when the remedy at law is subsequent to the injury, and the effects cannot be adequately compensated. Jeremy's Eq. Juris., 308.

In order to support a motion for an injunction, the bill should set forth a case of probable right, and a probable danger that the right would be defeated without the interposition of the court. It is not enough that a complainant shall allege in his bill that the injury will occur to himself or property, but he must show facts to enable the court to judge if the injury will be of the character stated, before he will be entitled to the interposition of the court. 1 Randolph, 206; 11 Fla. Rep., 167.

In the case of the Attorney General vs. New Jersey Rail-

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road & Transportation Co. the court say, "the injunction is a preventive remedy. It interposes between the complainant and the injury he fears or seeks to avoid. If the injury be already done, the writ can have no operation, for it cannot be applied correctively so as to remove it. 2 Green's New Jersey Rep., 141.

It is objected on the part of the defendants that the injunction in this case is used correctively and as a punishment; that the relief granted by the chancellor is inconsistent with the special relief prayed for in the bill, and for this and other reasons the injunction should be dissolved.

To this it is replied on behalf of the complainants, that if the court shall find that the bill contains no prayer for specific relief, corresponding to the relief decreed, yet under the prayer for general relief the court may grant any other relief, though inconsistent to the relief specially asked, provided it be agreeable to the case made by the bill.

Many authorities have been cited for and against the positions assumed, but we shall only refer to a few of the leading ones.

In the case of English vs. Foxhall, the Supreme Court of the U. States held, "that under a general prayer for relief, only relief consistent with the case made in the bill can be granted. The same court decided the same point in the case of Hobson vs. McArthur, and the citations from Story's Eq. are to the same effect. 2 Peter's Sup. Ct. Rep., 223; 8 Cond. Rep. Sup. Ct., 229; 16 Peter's Sup. Ct. Rep., 195; Story's Eq. Pl., §40, 41, 42, 43.

On examination it will be found that these authorities do not decide the question raised in this case; they decide that under the prayer for general relief, such relief may be afforded as is consistent with the case made in the bill, though not specially prayed for; but they do not decide that relief may be granted inconsistent with the relief specially asked.

In the case of Hiern vs. Mill, decided by Lord Chancellor

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Erskine, he said: "If the bill contains charges, putting facts in issue that are material, the plaintiff is entitled to the relief which those facts will sustain under the general prayer; but he cannot desert specific relief prayed and under the general prayer as specific relief of another description, unless the facts and circumstances charged by the bill will, consistently with the rules of the court, maintain that relief."

It is important to ascertain what were the rules of the English Courts of Chancery on this subject, in order rightly to understand the import of this ruling of the Chancellor. Formerly the chancellors prescribed rules governing the practice of that court in all matters, even to the manner in which bills should be framed; and this was so up to the 15 and 16 Vide., ch. 86, sec. 10, when Parliament passed an act to amend the practice of the Court of Chancery.

The length of a bill, with its charging part, and its pretences, was found to be inconvenient and unnecessary, and this act was passed in order to render the practice simple and easy in the preparation of bills and answers. "This statutory direction, says Mr. Daniel, does not alter the rules in force previously. That rule was, that when the prayer did not extend to embrace all the relief to which the plaintiff might at the hearing show a right, the defect in the relief might be supplied under the general prayer, provided that such relief was consistent with that specifically prayed, as well as with the case made by the bill, for the court would not suffer a defendant to be taken by surprise, and permit a plaintiff to neglect and pass over the prayer he had made, and take another decree, even though it were according to the case made by his bill." Daniel's Ch. Pl. and Prac., 383.

From this it will be seen that when Lord Chancellor Erskine said, "that the plaintiff cannot desert specific relief prayed and, under the general prayer, ask specific relief

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of another description, unless the facts and circumstances charged by the bill will, consistently with the rules of the court, maintain the relief," he must be understood as declaring that the rules of the court would not allow the plaintiff to ask specific relief of one kind and get specific relief of a different and inconsistent kind from that asked for.

In the case of *Butler et al. vs. Durham*, it was held by the Supreme Court of Georgia "that if there be a prayer for specific relief and also a prayer for general relief, the complainant shall have such other relief, under the general prayer, as is consistent with the case made and the special prayer and no more." 2 Kelly's Ga. Rep., 420; R. M. Charlton's Rep., 280.

In the case of *Stone vs. Anderson* and *Treadwell vs. Brown*, it was held by the Supreme Court of New Hampshire "that, under the prayer for general relief, the plaintiff may have such relief as he is entitled to, without regard to any defect in the prayer for special relief, provided it does not conflict with that specially prayed for." 6 Foster's Rep., 506; 44 New Hamp. Rep., 551.

The court, under the general prayer for relief, will grant such relief only as the case stated in the bill and sustained by the proofs will justify. The frame and structure of the bill in this case is for an injunction to restrain the defendants from running, using or removing locomotives and cars over the road or any part thereof, or committing waste thereon, or in any way, manner or form using the said road, to the detriment in value of the same, by wearing out the same; and for an account of the indebtedness of the plaintiffs to the defendants, and for a sale of the road to satisfy the same.

There is nothing in this bill looking to the impounding the revenues of the road, and requiring its officers to make monthly returns of its earnings and expenditures to the court. No such decree was either necessary or proper to preserve

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the property so that it might be forthcoming to respond to the plaintiffs' lien when asserted. If the facts would justify a prayer or decree for any such relief, the bill should have been framed with that view. This bill is not so framed.

The relief granted by the Chancellor is not the special relief asked for by the complainants, and if the decree made in this case is to be sustained, it must be under the general prayer for relief in the close of the bill. As to the relief to be given under a general prayer, we have seen the rule to be, that it must be agreeable to the case made by the bill, and not inconsistent with the relief specifically prayed for. *Chalmers vs. Chambers*, decided by the Court of Appeals of Maryland, 6 Harris & Johnson's Rep., 30.

In this case the relief asked for an injunction to restrain the defendants from running, using or removing locomotives and cars over the road, or any part thereof, or in any manner using the said road, and also for an account and sale of the road, to satisfy the debt and claim of the complainants; and a general prayer for such relief as to the court should seem meet.

The relief granted by the decree of the Chancellor is, "that the defendants be enjoined from executing or in any wise carrying into effect the agreement entered into between the President of the P. & G. R. R. Co. and the President of the A. & G. R. R. Co., relative to the sale or lease of said branch road, and that the A. & G. R. R. Co. be enjoined from paying over to the P. & G. R. R. Co. any sums of money growing out of the consideration upon which the aforesaid agreement, contract, or attempted sale or lease was made.

2d. That the A. & G. R. R. Co. be enjoined, until the further order of the court, from disposing in any manner whatsoever of any of the incomes and earnings of said branch road, except in the payment of the necessary repairs and the necessary expenses of running and operating said road.

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3d. That the defendant, the A. & G. R. R. Co., do make to this court a monthly report showing the gross amounts of its receipts from the said branch road, extending from Live Oak Station to the Georgia boundary line, and also the amount expended for repairs and the expenses of operating said road.

4th. "The same order as the above against the P. & G. R. R. Co."

5th. "That the defendants do appear before the Chancellor, at his Chambers at Lake City, on Friday, the 15th day of May, 1867, to show cause, if any they have, why a Receiver shall not be appointed in this case."

We are now called upon to decide if the relief granted is agreeable to the case made by the bill, and not inconsistent with that specially asked. The statement of the special prayer for relief and the relief granted answers the question, for it would be difficult to conceive anything in Chancery proceedings more inconsistent than the prayer for specific relief in this case, and the decree rendered.

The complainants ask that the defendants be restrained from running their cars and locomotives over the road to its injury and their detriment. The decree responds to this prayer of the complainants by permitting the defendants the free use of the road, but impounds the revenue arising from its use. The relief asked for is refused, but something else, wholly inconsistent, and to the great injury of the defendants, is granted. Was there any obstruction to the court's granting the particular relief prayed? If not, the plaintiffs could not abandon that asked and take a different decree under the general prayer. *Allan vs. Coffman*, 1 Bibb, R., 469; *Thompson vs. Smithson*, 7 Peter's Rep., 144; *Read vs. Cramer*, 1 Green. Ch. Rep., 277.

In this case we can see no obstruction to the granting by the Chancellor the particular relief asked, if it was proper to issue an injunction at all.

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The complainants charge in their bill the insolvency of the defendant, (P. & G. R. R. Co.,) and on the argument this was urged as a good ground for issuing the injunction.

The insolvency of the debtor is never a sufficient reason of itself for the exercise of the extraordinary power of the court by way of injunction, and courts have never acted upon the suggestion of insolvency in the debtor unless there was some other equitable ground for its interposition.

The case of Yonge & Bryan vs. McCormick, cited from 6 Fla. Rep., 370, is not in opposition to this recognized principle of equity. In that case the facts were as follows: The complainants had purchased from the defendant a tract of land, had paid a part of the purchase money and given their notes for the balance. The title to a part of the land was found to be in the wife of the defendant, and not in himself. The bill was filed to restrain the defendant from collecting the balance of the purchase money for which the notes had been given, and it sets forth the failure of consideration because of the defect of defendant's title to the land, and also the insolvency of the defendant. Baltzell, Ch. J., in delivering the opinion of the court, says: "The defectiveness of the title to a part of the property, and the inability of defendant, through insolvency, to compensate the deficiency, are the grounds of equity set forth by complainants, and are sufficient in themselves to entitle them to the injunction."

It will be seen, from an examination of this case, that the court do not place their decision on the ground of the insolvency of the vendor, but upon that of a failure of consideration and the insolvency of the vendor combined; and that it would be inequitable to allow the vendor to recover from his debtor a sum of money for property to which he had no title, and which, if paid, he, *ex aequo et bono*, ought to refund.

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It is urged in argument that the injunction was properly issued to restrain the defendants from committing waste by injury to or destruction of the property. To authorize the interposition of the court on this ground, the bill must set forth such a statement of facts as will warrant the exercise of this extraordinary power. To do this, it must appear to the satisfaction of the court that unless its aid is given irreparable injury would be done to the complainants, and these facts must appear in the bill to enable the court to judge if the injury will be of the character charged.

In the present case the answer of one of the defendants (the A. & G. R. R. Co.,) alleges that the value of the road has been greatly enhanced by the expenditure of large sums of money in improvements and repairs, and the court must be presumed to know that railroads, over which passengers and freight are daily transported, do not usually fall into decay, and are not liable to that irreparable injury from waste, which alone will authorize the granting an injunction to stay it.

In the case of Thebaut & Glazier vs. Canova et als., decided by this court at the last term, it is laid down that courts with great reluctance interfere with the free use and enjoyment of property by its owner, as his taste or his inclination may direct; and it is only in a case where it is clearly made out that this use and enjoyment is prejudicial and injurious to the rights of others, that it will lend its aid to restrain and abridge this free enjoyment. They should ponder long and consider well, when their aid is invoked for this purpose, before they act.

The complainants claim that they have a lien on the road for the work done and the materials furnished; that it is an equitable lien, and they are therefore entitled to the injunction granted. The existence of a lien will, it is true, authorize their going into a Court of Equity to enforce it, and will give to the court jurisdiction, but it does not follow,

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because they may have a lien for the security of the ultimate payment of their claim, that they are therefore entitled to an injunction to restrain the defendants in the free use and enjoyment of their property.

If it was made clearly to appear to the court that the complainants had an unquestioned lien on the road for the payment of their demand, yet before they would entitle themselves to the interposition of the court, by way of an injunction, they must allege and show that the use of the road by defendants would in all probability tend to its injury or destruction to an extent that would impair its value as a security for their demand, and peril its ultimate payment, when their lien shall come to be enforced in the courts by decree.

The facts contained in the record do not warrant the court in coming to the conclusion that such would be the case.

The road is within the jurisdiction of the court and cannot be removed. The answer of the A. & G. R. R. Co., one of the defendants, alleges, that by the large sums of money expended and laid out in repairs and improvements, the value of the road has been doubled, and that it is greatly more than sufficient to respond to the demand of complainants, if it shall be adjudged that they have a lien on it for the payment of their claim. Whatever lien the complainants may have cannot be lost or impaired by the action of the defendants, unless such action should result in injury to, or destruction of, the property to such a degree as to reduce its value below the amount claimed by the complainants.

No sale or transfer of the property pending this suit can convey a title that would defeat any lien they may have, and if the defendants were to attempt to impair its value by any act of waste or wanton destruction of the subject matter, to an extent that would render inadequate the complainants' security, it would be their right to apply for and

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receive the aid of a court of equity to restrain the defendants until they could assert their claim by a decree.

It is urged in argument that there is no equity in the bill, and that the complainants have a plain and adequate remedy at law. In the present condition of the cause, we do not feel called upon to decide the point made by the objection. This is an appeal from an interlocutory order of the chancellor granting the injunction to restrain the defendants from the use of their road. The bill sets up an equitable lien on the part of the complainants, which is denied by the defendants in their answers. From the record we do not clearly see that any such lien exists or is established, yet as it may be in the power of complainants to establish the existence of a lien on their part, the bill will not be dismissed.

For the reason herein set forth, we think the injunction in this case was improvidently granted, and that it must be dissolved at the cost of complainants and the case remanded to the Circuit Court of Suwannee Circuit for further proceedings, not inconsistent with this opinion.

BAKER, J., delivered the following opinion:

I fully concur in the judgment of the court, and adopt the reasons given for the reversal of the chancellor's order granting the injunction. I do not however, concur in the expression or intimation of any opinion on the question of complainant's lien.

The case presented by the record being an appeal from an interlocutory order, the judgment rendered settles all the questions properly presented for our decision.

It is true that the counsel on both sides elaborately argued the merits of the case before us, asking a decree under the provisions of the statute authorizing this court, in cases of appeal, to make such "decree as the court below ought to have given."

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The question is here presented: Ought the chancellor to have given any final decree in this case? I think not.

The complainants were not entitled to a decree on their *ex parte* testimony filed for the purpose of securing the writ of injunction, which might possibly be explained or rebutted by defendants.

Neither could the bill have been dismissed, unless it failed to set forth any equitable claim. A denial in the answer of all the equities would not be sufficient to sustain such decree.

If, therefore, the condition of the case was such that it did not become the duty of the chancellor to give a decree, this court would certainly exceed its powers in doing so. Taking this view of the case, I do not consider it proper to express or intimate any opinion on the equitable lien claimed, which might possibly influence the chancellor in his decision or in any way embarrass this court, should the question hereafter be properly presented for adjudication.

The following dissenting opinion was delivered by Judge PUTNAM:

I am unable to concur in opinion with the majority of the Court.

The bill shows that appellees entered upon the portion of road belonging to the P. & G. R. R. Co., lying between the Live Oak station and the line dividing the States of Florida and Georgia in the month of April, 1864, under a contract made between the Pensacola & Georgia R. R. Co. and the Confederate Government, by which the latter was to put the road-bed over that portion of the line in "fit and proper condition to receive the track," to place thereon the iron, for which, as more fully appears by the answer of the Pen. & Georgia R. R. Co., the Confederate Government was to have the use during the continuance of the then existing war,

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and at its close was to be paid therefor by the Pen. & Ga. R. R. Co. if they could agree upon the value; failing in this, the Confederate Government was to remove the superstructure. The bill also alleges that appellees were placed in possession of said "branch road with the full knowledge of the P. & G. R. R. Co., and that they have, as professional railroad builders, expended in work and labor by them performed, and in materials by them provided and furnished, the sum of \$37,379.60, in improvements upon said branch road, and for which they have not received compensation. The bill also alleges that at the close of the war appellees were still in the possession of said road; that they have never delivered possession thereof to the Confederate Government, but were dispossessed by the military forces of the United States. It also alleges that they have an equitable lien thereon for their compensation; that the P. & G. R. R. Co., has received substantial benefit from their said improvements, and have paid nothing for them, and are insolvent, having no other property out of which satisfaction for their demand can be made; and it further alleges that said company has disposed, or is about disposing of said branch road to the Atlantic & Gulf R. R. Co., a foreign corporation, for the purpose of defeating their lien, and prays account, discovery, injunction and relief.

The answer of the Pen. & Ga. R. R. Co. does not deny any of the material allegations of the bill, except notice, but sets up an alleged violation of the agreement on the part of the Confederate Government, and claims that the improvements were made by appellees for the Confederate Government and not for defendants. There is no pretence that the P. & G. R. R. Co. ever gave any notice to complainants of the breach aforesaid, or at any time notified them that the P. & G. R. R. Co. would not pay for their repairs and improvements.

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The answer also claims that this defendant was placed in possession of this portion of their road by the military forces of the United States.

The A. & G. R. R. Co. set up in their answer the illegality of the contract under which the repairs and improvements were made, and alleges that it is a purchase for valuable consideration without notice, and sets out an agreement under which it claims and admits it is a foreign corporation. The bill alleges that the A. & G. R. R. Co. had notice both of the repairs and improvements, and of their lien.

In applying certain recognized principles of equity jurisprudence to the case, as thus presented by the record, the first question for consideration is, have appellees made a case which entitles them to an equitable lien for compensation? Second, the propriety, under the showing, of granting the injunction? Mr. Justice Story, in his excellent treatise on equity jurisprudence, sec. 1217, says: "there are liens recognized in equity, whose existence is not known, or obligation enforced at law, and in respect to which courts of equity exercise a very large and salutary jurisdiction." Again, in sec. 1236, "the doctrine of contribution in equity is larger than at law, and in many cases repairs and improvements will be held to be, not merely a personal charge, but a lien upon the estate itself." In section 1237, the same author says: "Courts of equity have not confined the doctrine of compensation, or lien, for repairs and improvements, to cases of agreement or joint purchasers, but have extended it to other cases, where the party making the repairs and improvements has acted *bona fide* and innocently, and there has been a substantial benefit conferred on the owner, so that *exaequo et bono*, he ought to pay for such benefit."

Viewing this case in the light of the doctrine above laid down, the conclusion is irresistible, that the appellees are entitled to their equitable lien for compensation as against

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the P. & G. R. R. Co. The company has been substantially benefitted by the repairs and improvements placed upon its road by complainants, and for which they have paid nothing.

The answer of this defendant shows that the company had knowledge of the improvements being made, for it alleges a protest made to the agent of the Confederate Government for an alleged violation of contract, yet the company gave no notice to complainants, nor did it forewarn them against proceeding with their work, but stood by and suffered the improvements to be made upon their property, whereby it is greatly enhanced in value. To permit the company thus to enrich itself at the expense of complainants, would be contrary to every principle of equity and justice.

The contract set up by the P. & Ga. R. R. Co. in their answer with the Confederate authorities under which these repairs and improvements were made by complainants, so far implicates this defendant as privy thereto, as to attach the equities of complainants and to entitle them to an enforcement of their lien for compensation out of the property in the hands of the P. & G. R. R. Co.

Nor can I percieve that the answer of the defendants in any particular entitles them to any modification of these equitable doctrines in their application to this case. The well settled principle, *delicto*, estops them from making it available for their relief.

The agreement set up was for repairs and improvements to be placed upon the property of one of the parties, the P. & G. R. R. Co., to be compensated in part by use and enjoyment, the balance upon the happening of an event in money, by the owner, the P. & G. R. R. Co.

In the case of Woodward vs. Lively, 36 Pennsylvania State Reports, 437, cited at bar, it was held by the court that although, in one aspect an improvement lease, nev-

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ertheless, as to *mechanics and material men*, to be a contract for the erection of the buildings, payable partly in money and partly out of the profits of the land, and the estate of the lessor is bound by the lien." Here the lien was held to attach to the estate which had been enhanced in value by the improvements placed thereon, and I am unable to perceive any distinction in the cases which should change the rule there laid down in its application to the case at bar.

Whether the defence set up by the A. & G. R. R. Co. can avail to relieve the property in their hands from the operation of the lien, is a question more properly to be considered on the final hearing of the cause. Without expressing an opinion as to the validity of the contract between the two defendants touching the sale or lease of the road, it is sufficient that the bill, answers and exhibits disclose such a state of facts as eminently to justify the chancellor in the court below in his action in holding the questions presented for further consideration when the case should be submitted upon the proofs.

Having thus disposed of the question of lien, it only remains to inquire whether, agreeably to the case made by the record, the chancellor in the court below erred in granting the order from which an appeal has brought the case before this court.

This court, in the case of the city of Apalachicola vs. the Apalachicola Land Co., 9 Florida Reports, authorizes the chancellor, on a motion for an injunction, to go into the consideration of the merits as disclosed in the bill and which are intrinsic and dependent upon its express allegations and charges.

In the spirit of this decision, in a case where the answers of the defendants are filed, it would be the duty of the chancellor, for the same purpose and to the same extent, to consider the merits of the case as presented by the entire record.

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The case made by the bill, upon which the correctness of the action of the court below is to be tested, may be briefly stated as follows:

1. The bill alleges permanent repairs and improvements upon the property of one of the defendants, with notice, and without objection, by which that defendant has been essentially benefitted, and for which complainants have received no compensation, and asserts an equitable lien.

2. It alleges the pendency of a suit at law for the recovery of the demand; that the P. & G. R. R. Co. is insolvent and has no other property than that by complainants improved, out of which compensation can be had, and that unless their lien is enforced upon that specific property, they are without remedy.

3. It alleges an attempted disposition of the property to the other defendant, the A. & G. R. R. Co., a corporation having its existence without the jurisdiction of this court, with notice of the existence of lien, for the purpose of defeating it.

4. That complainants are professional railroad contractors; that the repairs and improvements are of a character requiring mechanical experience and skill in their construction, and that they have never been legally dispossessed of their work upon said road.

The answer of the P. & G. R. R. Co. does not deny any of the material allegations of the bill, except the existence of the lien, and notice of the performance of the work by complainants, but sets up a breach of contract on the part of the Confederate Government, yet does not bring home to complainants notice of the alleged breach.

The answer of the A. & G. R. R. Co. sets up illegality of the contract, denies notice of the lien, and alleges that they are purchasers without notice and consideration paid, and makes exhibit of the contract under which they claim.

On application for injunction after answer, the court will

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look only to the facts that are responsive to the bill and will presume against defendant when he has not answered what he ought to have answered, and will disregard new equities set up to avoid those set up by the bill. The P. & G. R. R. Co. does not deny the insolvency charged, nor that the repairs and improvements were made by complainants, nor that they had disposed of the property in controversy.

Insolvency has been held by this court a sufficient ground for granting an injunction.

Willard on Injunctions says, page 22, that an injunction may be granted where the defendant, against whom there is otherwise a good remedy at law, is insolvent or about to abscond. On page 100, the same author declares, "that it is not error to refuse to dissolve an injunction where the *insolvency* of a party on whom the equity of a case largely depends, is charged positively upon knowledge and belief in the bill and positively denied in the answer."

While the court will abstain from committing itself to points or questions which will arise on the final hearing, it will examine into them sufficiently to enable it to determine whether the injunction should be granted or refused. The court will then balance the facts as alleged by the respective parties to enable it to come to a correct conclusion. In doing this, if complainants have made a case showing a *probable danger*, the right may be defeated and an injunction may be granted. Read et al. vs. Dews et al., R. M. Charlton's Rept., 356.

The present case is much stronger. As against the P. & G. R. R. Co. there can be no question as to the propriety of the action of the court below in granting the injunction; and in the case of the other defendant, the A. & G. R. R. Co., it is equally clear to my mind that the facts justify the action of the chancellor. It is a non-resident corporation, in possession of the property, using it to the detriment of complainants, holding by at least a questionable claim and withdrawing

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the earnings of the road from the jurisdiction of the court. The granting and continuing an injunction rests in the discretion of the court, to be governed by the nature of the case.

The order in this case is not inconsistent with the case made by the record; and it seems carefully to guard the rights of all parties, with little or no hardship or injury to either. Nor do I perceive anything in the frame of the bill inconsistent with the rules of pleading or rendering it liable to the exception urged by appellants. I am, therefore, of the opinion that the injunction granted by the chancellor should not be dissolved.

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APPELLEE.**

1. When the question of malice has arisen in cases of homicide, the matter for consideration is, whether the act was done with or without just cause or excuse. A wrongful act done intentionally, without just cause or excuse is said to be done maliciously.
2. The implication of malice arises in every instance of homicide and in every charge of murder, the fact of killing being first proved, the law will imply that it was done with malice.
3. To rebut the implication of malice, all the circumstances of accident necessity or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him.
4. If the evidence proves a previous grudge or bad blood, or menaces, or expressions of vindictive feeling, or a former attempt on the part of the accused to do the deceased some great bodily harm, there can be but little hesitancy in declaring that the killing was done upon "express malice." unless it can be shown, that at the time of the killing, the accused was smarting under a recent and great provocation, calculated to arouse sudden and violent anger.

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5. The law implies malice from any deliberate and cruel act against another, however sudden; and if the natural consequence of the act would be the death of another, a court and a jury may fairly infer that it was done with intent to kill such other person, and is, therefore, murder. An act is said to be deliberate within the meaning of the law when it is voluntarily done.
6. The natural and necessary inference is, that a cruel act, willfully done, without apparent excuse, is done "*malo animo*," in pursuance of a wrongful and injurious purpose, *previously*, though perhaps suddenly formed, and if death ensues from such act, it is "a homicide with malice aforethought," which is the true definition of murder.
7. When from the evidence the jury are satisfied of the previous existence of malice in the slayer, its continuance down to the perpetration of the homicide must be presumed, unless there is evidence to rebut it and show the wicked purpose had been abandoned.
8. When an antecedent grudge has been proved, and there is no satisfactory evidence to show that the wicked purpose had been abandoned it must be clearly shown to the court and jury that the provocation was great, in order to warrant them in finding that the killing was on the recent provocation, and not on the old grudge.
9. Whenever a dangerous weapon is used against an unarmed adversary, even upon a reasonable provocation, the killing will be murder and not manslaughter, for the law implies from the use of a dangerous weapon that the intent was to kill, and not to fight on equal footing.
10. There is no means by which an Appellate Court can ascertain if there was a rational doubt in the minds of the jury as to the guilt of the accused. When a case of homicide is brought to this court, on appeal the grade of the offence must be determined by the evidence in the record.

This case was argued at Lake City and decided at Tallahassee.

Appeal from Suwannee Circuit Court.

A statement of the case is contained in the opinion of the Court.

J. J. Finley for Appellant.

At the Fall term of the Circuit Court for the county of Suwannee, the appellant was arraigned, tried and convicted on an indictment for the murder of Melvin Brock.

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I. It is contended for the appellant, that the evidence used upon the trial and presented in the record now before the court, made out a case of manslaughter only, and not murder, and consequently did not warrant the finding of the jury in the court below.

If it can be shown from the evidence or by inferences from the circumstances of the case, that the offence was of a mitigated character, then the verdict of the jury should have been manslaughter and not murder. Roscoe's Cr. Ev., 664.

Was the killing in this case murder?

To answer this question satisfactorily, demands a nice and accurate examination of the law, defining the crime of murder—a close investigation of the evidence in the case and a careful and patient consideration of the effect which should be given to it.

What constitutes murder?

According to the common law "murder is where a person of sound memory and discretion, unlawfully kills any reasonable creature in being, in the peace of the State, with malice prepense or aforethought, either express or implied."

From this it doth appear, that *malice aforethought* is an essential ingredient in the crime of murder, and that in its absence there can be no murder.

But this malice, without which no killing can be murder, may be either *express* or *implied*.

What is express malice?

It is express where, one with a sedate and deliberate mind and formed design, kills another, as by lying in wait, &c. U. States Cr. L., (Lewis) 354.

What is implied malice?

It is implied by law from any deliberate cruel act, committed by one person against another, however sudden. U. States Cr. L., (Lewis) 354.

Now, let us apply these legal tests to the evidence in this case, and if, upon being fairly tried by them, it does not

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make out a case of murder, then it will be made manifest that the conviction of the appellant in the court below was erroneous and should be reversed.

I. It is not to be presumed that the parties fought upon the old grudge, unless it appears from the whole circumstances of the fact. 1 Hawk. P. C. ch. 31, sec. 30.

The evidence shows that the deceased fought upon the old grudge, but that the accused fought upon a fresh provocation.

2. Where fresh provocation intervenes between preconceived malice and the death, it ought clearly to appear that the killing was upon the antecedent malice. U. S. Cr. L., (Lewis) 355; Am. Cr. L. sec. 955.

3. The accused is entitled to the full benefit of any facts proven on the trial, which tend to prove the intent with which the homicide was committed, and which tend to show that it was without that legal malice which constitutes murder. Roscoe's Cr. Ev., 663, note 1.

4. Where the provocation was recent, it rebuts the evidence of malice. Roscoe's Cr. Ev., 684.

5. Where death ensues from a sudden transport of passion or heat of blood, if upon reasonable provocation and without malice, or upon a sudden combat, it will be manslaughter. Roscoe's Cr. Ev., 638.

II. It is contended for the appellant that the verdict of the jury was contrary to law, because they did not give the accused the benefit of the reasonable doubt fairly arising on the evidence as to whether he was guilty of murder or manslaughter, to the benefit of which he was entitled by the law of the land, which law was given them in charge by the court.

In aid of the authorities already cited, I cite. Am. Cr. L., sec. 990, (latter clause); Ibid, 926, note p; U. States Cr. L., (Lewis) 394; see charge to the jury in Commonwealth vs. Poke, Am. Cr. L. § 979.

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James Banks for the Attorney General.

Homicide is, defined by Wharton on Criminal Evidence, page 949, sec. 945, 952, 930; East's Pleas of the Crown, page 214; Raymond's Reports, page 1455; State vs. Jacob Johnson, 2d Jones' N. C. Repts., page 247; State vs. Madson Johnson, 1st Iredell Repts., page 354; Manslaughter, East's P. C., page 230.

When two are fighting and a third, unconnected, steps up and kills one, it is murder. Wharton's Criminal Law, page 975, sec. 973.

If doubtful whether the act was murder or manslaughter, the jury should give the benefit of the doubt and find the lesser offence. See Wharton on Cr. Law, page 700.

The Judge charged the jury to give the benefit of the doubt and read the statute on manslaughter. Court opposed to setting aside verdicts when the facts have been fairly submitted to a jury. State vs. Jeffrey, 3d N. C. Rep., page 487, and see Wharton on Criminal Law, 3110, 305.

Judge not to interfere with province of Jury. Graham & Waterman on New Trials and References.

Where merits are fairly submitted to the jury, their verdict shall stand. Graham & Waterman on New Trials, page 362, and onward; Second Archbd. Practice, 222.

Under certain circumstances verdict will not be set aside, even if against evidence. Graham & Waterman on New Trials, page 380, and onward.

There were other persons present at the killing who could have been examined by defendant as the record shows, and doubtless would have been if they could have bettered his case.

Court will not grant a new trial even if *doubtful*. Graham & Waterman on New Trials, page 388.

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When grounds are technical, not granted. Same authority.

DOUGLAS, J., delivered the opinion of the Court.

The prisoner, John Holland, was indicted at the Fall Term of Suwannee Circuit Court for the killing of Melvin Brock.

On the trial he was found guilty of murder, and was sentenced by the court to suffer the penalties of the law, from which sentence he has appealed to this court. His counsel have endeavored to show in argument that the offence was manslaughter and not murder, and now asks that the judgment of the Circuit Court of Suwannee county be reversed and a new trial granted to the prisoner.

The material facts in the case, as disclosed by the evidence, are: That on the 2d day of August last, the prisoner and the deceased, together with other persons, had on that day been employed at work pulling fodder, that while thus in company a dispute arose between the prisoner and the deceased, in relation to a small sum of money, claimed to be owing from the deceased to the prisoner—the one claiming more than the other was willing to admit to be due, and both asserting their statements of the amount to be correct. Some offensive language was used by the prisoner, and angry words were employed by both parties. Both were at the time armed with pocket-knives, which they had in their hands at the time the dispute arose. The deceased stated to the prisoner that he did not want to fight him, but that he must retract the “damned lie” which he had given him, or he would have to fight. The prisoner refused to retract the language complained of by the deceased; and John Barnes, one of the witnesses who was present, seeing that a difficulty was likely to occur, told them to shut up their knives. The deceased shut up his knife and put it into his

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pocket, but the prisoner refused to do so, saying he would not shut up his knife for any man. After this the offensive language was several times repeated by the prisoner, who dared the deceased to strike him. The prisoner then made a gesture as if going to cut the deceased, who turned from him in the act of running, at which time the prisoner cut at him, and cut his shirt on the shoulder near the under part of the arm, and pursued him until stopped by those present, and the knife was taken from him. The deceased then came back and tried to reason the case with the prisoner, who was much excited, crying and cursing, and saying he would shoot the deceased if he did not pay him.

The parties were together that evening for some time afterwards, but no further difficulty occurred, and they separated without a reconciliation.

On the next afternoon, being the Sabbath, in returning from preaching, the prisoner and deceased met, and the quarrel was again renewed, but it does not distinctly appear who commenced it.

James Holland, the brother of the prisoner, was then present, with one or more of the persons who had been present on the day before. There is a good deal of testimony as to what took place at this second meeting, but the important facts are few, and about them there is no conflict of evidence.

From this testimony we learn that the deceased, when talking about the occurrence of the previous day, said to the prisoner, "if you will take back the damned lie which you gave me on yesterday, I will settle it with you without a fuss; if not you have got me to fight." That the prisoner refused to retract what he had said, and that offers and propositions were then made by the deceased, who was the larger and stronger of the two, to make it a fair fight. These offers and propositions were refused by the prisoner, who

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said "he would not fight him a fair fight, but when he fought him he would go into him."

After some more words between the parties, the prisoner took his coat off and was about to engage in a combat with the deceased, when James Holland, the brother of the prisoner, interposed and said to the deceased, "you shan't fight where I am." While these and other words were passing between the deceased and James Holland, the prisoner stepped a short distance and obtained a knife from a person who then had it, and returned to where he had been standing.

During the time the prisoner had turned away to get his knife, his brother and the deceased had confronted each other, and James Holland had very roughly pushed or struck the deceased in the breast, shoving him out of his tracks, and had received in return a blow in the face which staggered him back. On recovering from the effect of the blow, James Holland and the deceased were in the act of closing in combat, or had hold of each other, the witness does not remember which, when John Holland, the prisoner, ran up and struck the deceased two blows with a knife, inflicting two wounds, which proved mortal, and from the effects of which the deceased died in less than an hour.

Upon this state of facts, it is argued on behalf of the prisoner that the offence of which he is guilty is not murder but manslaughter, and that having been convicted of murder, he is entitled to a new trial. There were no exceptions taken to the ruling of the Judge on the trial in the court below, and the single question for this court to determine is, whether the evidence shows the homicide to have been committed under such circumstances as will make it murder, or is there such absence of malice as to reduce it to manslaughter.

Murder is defined to be the voluntary killing of any person in the peace of the State, with malice, prepense or afore-

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thought, either express or implied by law. The sense of which word *malice* is not confined to a particular ill-will to the deceased, but is intended to denote an action flowing from a wicked and corrupt motive, a thing done *malo animo*, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent upon mischief. East's Pleas of the Crown, ch. 5, sec. 2.

Lord Holt has defined malice, when used in a legal sense, to be a term importing directly wickedness, excluding a just cause or excuse.

In the case of the King vs. Hawey, Best, Judge, said, "the legal import of this term, (malice) differs from its acceptance in common conversation. It is not as in ordinary speech only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind. Thus in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is neither necessary in support of such indictment to show that the prisoner had any enmity to the deceased, or would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional, and done without any justifiable cause. 2 Barn & Cres., 268.

When the question of malice has arisen in cases of homicide, the matter for consideration is, whether the act was done with or without just cause or excuse. A wrongful act done intentionally without just cause or excuse, is said to be done maliciously. 10 Barn. & Cres., 272.

The implication of malice arises in every instance of homicide, and in every charge of murder, the fact of killing being first proved, the law will imply that it was done with malice, and all the circumstances of accident, necessity or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him.

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East's Pleas of the Crown, ch 5, sec. 12; Poster's Cr. Law, 225, 255; 1 Hale P. C., 455; Commonwealth vs. Webster, 5 Cush., 320; 1 Hill's Rep., 277; 2 Masons's Rep., 91; The King vs. Oneby, 2 Ld. Raym., 1485; 1 Greenl. on Ev., sec. 34.

Usually, courts and juries have little or no difficulty in determining if the killing was upon express malice. If the evidence proves a previous grudge, quarrel or bad blood between the accused and the deceased, which had not at the time of the killing been reconciled, or if there be proof of menaces or expressions of vindictive feeling towards the deceased by the accused, or a former attempt on the part of the accused to do the deceased some great bodily harm, there can be but little hesitancy in declaring that the killing was upon express malice, unless it can be shown that at the time of the killing the accused was smarting under some great provocation, calculated to arouse sudden and violent anger.

In cases of homicide, where the grade of the offence depends on the malice implied by law, it may sometimes become difficult for courts and juries to determine whether the offence is murder or manslaughter. Out of tenderness to the frailty of human nature, if upon sudden and violent passion, occasioned by some great provocation, one person kills another, the law palliates the criminality of the offence, and makes the crime manslaughter, which otherwise and without the provocation, would be murder. When the law is thus merciful, it is not to be wondered at that courts and juries, who are but men and have the sympathies and feelings of men, should sometimes permit offenders to escape who truly deserve the extreme penalty of the law.

There are some marked and well defined distinctions between the crime of murder and manslaughter, which if carefully considered, will in most cases enable courts and juries

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to distinguish between them, and to escape the reproach of setting offenders at liberty to depredate upon society.

In cases where express malice is proved, there can be no difficulty, and it is only in cases where the malice is implied by law that there is difficulty in determining the grade of the offence.

When a man commits an unlawful act, unaccompanied by any circumstances justifying its commission, it is a presumption of law that he has acted advisedly, and with an intent to produce the consequences which have ensued.

If the natural consequences of the act would be the death of another, a court and jury may fairly infer from the act that it was done with intent to kill such other person, and they will be warranted in finding that it was done with malice, and is therefore murder. 1 Archbold's Cr. Prac. and Plead., 393.

If the commission of the act is attended by such circumstances as to denote that it flows from a wicked and corrupt motive, that it was done *malo animo*, and with a wicked and mischievous intention of a mind regardless of human life, there can be no difficulty in declaring it to be murder, if death ensues from such act.

The law implies malice from any deliberate cruel act against another, however sudden, and the act is deliberate within the meaning of the law when it is voluntarily done. East's Pleas of the Crown, ch. 5, sec. 2.

The wilful and voluntary act of destroying the life of another, is an act wrong and unlawful in itself, injurious in the highest degree to the rights of another, being the greatest wrong which can be done to him, contrary to the laws of nature as well as society, and in violation of the plainest dictates of conscience. The natural and necessary conclusion and inference from such an act wilfully done, without apparent excuse is, that it was done *malo animo*, in pursuance of a wrongful, injurious purpose, *previously*

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ugh perhaps, suddenly formed, and is therefore, "a homicide with malice aforethought, which is the true definition of murder." Commonwealth vs. York, 9 Metcalf's Rep., 04.

We have seen that every homicide is in law presumed to be murder; and when the killing has been proved, the accused must show that it was attended with circumstances of accident, necessity or infirmity, to reduce it to a lower grade of crime.

"Manslaughter is principally distinguishable from murder in this: that though the act which occasions the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting, and the act being imputed to the infirmity of human nature, the correction ordained for it is proportionately lenient." East's Pleas of the Crown, ch. 5, sec. 4.

From the above distinction between murder and manslaughter, it will be seen "that the true nature of manslaughter is, that it is homicide mitigated out of tenderness to the frailty of human nature, and that the law, in making allowance for man's infirmity, supposes that when assailed with violence or great rudeness, he is inspired with sudden impulse of anger, and, if before reasonable time is given for cool reflection and for his passion to subside, he slays his assailant, it is regarded as done through heat of blood and violence of anger, and not through malice or that cold-blooded desire of revenge which more properly constitutes the feeling, emotion or passion of malice."

To entitle the accused to the benefit of this human interpretation of the law, the provocation upon which he acts must be reasonable and sufficient, and such as would ordinarily and naturally excite a reasonable man to violent anger and cause him to lose control of his passion. It has been said "that passion without provocation, or prov

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tion without passion, is not sufficient and where there is both passion and provocation, the provocation must be reasonable and sufficient.”—State of Penn. vs. Honeyman; same vs. Bill; same vs. McFall, Addison’s Rep., 149, 162, 256; same vs. Robinson, Ib. 248.

In case of mutual combat, in order to save the party killing from the guilt of murder, not only must the provocation be reasonable and the occasion sudden, but the party assailed must be put on an equal footing in point of defence, for even upon reasonable provocation, if one who is armed with a dangerous weapon attacks an unarmed adversary and kills him, it will be murder and not man-slaughter, for the use of a dangerous weapon shows the intent was to kill and not to fight.—East’s Pleas of the Crown, 242; State vs. Marten, 2 Iredell’s Rep., 116; State vs. Johnson, 1 Iredell’s Rep., 354; State vs. Scott, 4 Iredell’s Rep., 409; 28 Miss. Rep., 688; 1 Ohio Rep., 66; 2 Hill’s So. Ca. Rep., 619.

In the case of the State vs. Scott, it appeared that the deceased had threatened the prisoner about three weeks before that he would kill him; that they met in the street on a star-light night, when they could see each other; that the deceased pressed for a fight, but the prisoner retreated for a short distance; that when the deceased overtook him, the prisoner stabbed him with some sharp instrument, which caused his death, and at the time of this meeting the deceased had no deadly weapon. It was held, that in such a case to mitigate the offence from murder, it must appear from the previous threats, and the circumstances attending the recontre, that the killing was in self-defence—the presumption being that the killing was malicious.

This decision is in strict accordance with the English and American cases, and with the text of approved elementary writers—that whenever a dangerous weapon is used against an unarmed adversary, even upon reasonable provocation,

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the killing will be murder and not man-slaughter, for the law implies the intent was to kill and not to fight on equal footing.

It is difficult to say what will or will not amount to reasonable and sufficient provocation, and each case must, in a great measure, depend upon the circumstances that attend it. No court can undertake to say what provocation will extenuate the killing, but must decide in each case if the provocation given was reasonable and sufficient. While the books do not undertake to say what provocation will be reasonable, they are very clear and explicit as to what will not be sufficient. Thus it is laid down in East's Pleas of the Crown, ch. 5, sec. 20, that "words of reproach, how grievous soever, are not provocation sufficient to free the party killing from the guilt of murder; nor are contemptuous or insulting actions or gestures without an assault upon the person; nor is any trespass against land or goods. This rule governs every case, where the party killing upon such provocation made use of a deadly weapon, or otherwise manifested an intention to kill or to do some great bodily harm. The law as thus laid down by this able and approved writer, has been adopted by the courts by both England and America.

With these views of the law of homicide as applicable to this case, we will proceed to the consideration of the case before us.

The prisoner, John Holland, was indicted at the Fall Term of the Circuit Court for Suwannee county, for the wilful murder of Melvin Brock, and upon the trial was found guilty, and sentenced to be hung. He has appealed from the sentence to this court, and we are now to consider and determine if there were any circumstances attending the killing that should reduce the grade of his crime from murder to man-slaughter, or in other words, was there that absence of malice either express or implied, that would render the killing man-slaughter and not murder?

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The evidence shows that on the 2d of August, the prisoner and the deceased had a dispute and quarrel about a small sum of money due from the deceased to prisoner, and that the prisoner then made threats against the deceased, that he would shoot him if he did not pay him and attempted to do deceased some great bodily harm with a dangerous weapon then in his possession. That very soon after this, the deceased attempted to reason the case with the prisoner, who was much excited, crying and cursing, and saying he would shoot the deceased if he did not pay him. The evidence further shows, that the parties were together for some time afterwards, and that no reconciliation took place, and that they parted without a friendly understanding or becoming reconciled.

Upon this state of facts, if the prisoner had on the next day met the deceased, and without any further quarrel or words killed him, it cannot be doubted for a moment that the killing would have been murder upon express malice.

Let us now examine, if what subsequently took place has changed the grade of guilt, and made the killing only manslaughter, as is now contended for on behalf of the prisoner.

It will be seen from the evidence that on the next afternoon the prisoner and the deceased were thrown together again in returning from preaching, and the quarrel was renewed; but it does not clearly appear who commenced it. At that time several persons were present, and among them, James Holland, the brother of the prisoner. Offers were made to settle the dispute between the prisoner and the deceased. It was offered on the part of the deceased, that if the prisoner would "take back the damned lie which had been given on the day before, he would settle it with the deceased without a fuss, if not you have got me to fight." This the prisoner refused to do, saying he never took back anything he said. After this a proposition was made by the deceased, (who was the larger and stronger of the two,) he

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red to lay down and give the prisoner the advantage, by
ing him take his hold and thus fight him, but the prison-
declined to do so, and said: "I will not fight you a fair
ght, but whenever I fight you, I will go into you."

Very soon afterwards the prisoner took off his coat at the
request of the deceased, preparatory to a fight, and the
parties were in the act of engaging in combat, when James
Holland, the brother of the prisoner, interposed and said to
the deceased, "you shan't fight where I am." This interpo-
sition on the part of James Holland produced words between
him and the deceased, which led to blows, as will be seen
from a statement of the evidence. While James Holland
and the deceased were in angry discussion, and before any
blow had passed, the prisoner went a few steps to get his
knife, which was in the possession of one of the persons
present, and on his return, seeing his brother and the de-
ceased confronting each other and about to close, or already
closed in combat, he ran up and struck the deceased two
blows with a knife, which proved mortal in a short time.

From this uncontradicted statement of facts, can there be
a doubt that the killing of Malvin Brock was done *malo an-
imo*; that it was intentional and without reasonable provoca-
tion or justifiable cause? The attendant circumstances
"carry in them the plain indications of a heart regardless
of social duty, and fatally bent upon mischief," which is the
true and legal definition of that implied malice constituting
the guilt of murder. The use of a dangerous weapon, the
probable consequence of which would be the death of
another, shows the intent was to kill and not to fight, and
there being no reasonable or sufficient provocation, the law
infers the act was done with a wicked and mischievous in-
tention of a mind regardless of human life.

It was urged with much earnestness and ability at bar,
that the attempt of the prisoner to cut the deceased with
knife on the day preceding the one on which the homicid

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took place, together with the threats then made, do not establish the existence of malice, but the killing was the result of the recent provocation, and that the jury were not warranted in inferring malice from these circumstances.

We cannot give our assent to this position. In our opinion these acts are of the most weighty character to prove the existence of an antecedent grudge, which is the very essence of express malice.

In the case of the State vs. Ford, 3 Strobh., 517, and Keener vs. The State, 18 Geo. Rep., 194, it was held, "that the remoteness or nearness of time, as to threats and declarations, pointing to the act subsequently committed, make no difference as to the competency of the testimony to prove malice."

"When from the evidence the jury are satisfied of the previous existence of malice in the slayer, its continuance down to the perpetration of the homicide must be presumed, unless there is evidence to rebut it and show that the wicked purpose has been abandoned."

When it becomes necessary to decide whether the killing was upon an antecedent grudge or on a recent provocation, in order to determine the guilt of the prisoner as to murder or manslaughter, we hold the rule to be this: When an antecedent grudge has been proved and there is no satisfactory evidence to show that the wicked purpose has been abandoned, it must be clearly shown to the jury that the provocation was a grievous one in order to warrant them in finding that the blow was struck on the recent provocation and not on the old grudge.

In some of the States it has been decided that when a deliberate purpose to kill or to do great bodily harm is ascertained, and there is a consequent unlawful act of killing, the provocation, whatever it may be, which immediately precedes the act, is to be thrown out of the case and goes for nothing, unless it can be shown that this purpose was

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abandoned before the act was done. *State vs. Johnson*, 3 Iredell's Rep., 354; *State vs. Ferguson*, 2 Hill's S. C. Rep., 619; *State vs. Jane*, 4 Iredell's Rep., 113; *State vs. Tolley*, 3 ib., 424; *Stewart vs. The State*, 1 Ohio Rep., 66.

It is assigned as error "that the jury in making and rendering their verdict, did not give to the accused the benefit of the reasonable doubt fairly arising on the evidence as to whether he was guilty of murder or manslaughter, to the benefit of which doubt the accused was entitled by the law of the land, and which was given in charge by the court."

We can see no means by which this court can ascertain if there was a rational doubt in the minds of the jury as to the guilt of the prisoner. On this point they were properly charged by the court as to the law, and we presume, from the facts of the case, they entertained no reasonable doubt of guilt.

If the evidence established that it was a case of homicide, without malice and upon reasonable provocation, it would then be the duty of this court to grant the accused a new trial, regardless of any doubt or absence of doubt on the minds of the jury, which we cannot know existed. But from the views herein expressed by the court, it will be seen that we are of opinion that the jury might well find the killing to have been upon express malice, or upon implied malice, arising from the circumstances attending the killing.

The judgment and sentence of the court below is affirmed, which will be certified to the Judge of the Suwannee Circuit, in order that the said judgment and sentence may be carried into effect.

Sutton vs. The State of Florida—Opinion of Court.

SIMON SUTTON, APPELLANT, vs. THE STATE OF FLORIDA.

1. The carrying arms on the person partially concealed is construed to be a violation of law prohibiting the carrying of arms secretly. The statute provides that arms shall be carried openly outside of all the clothes.

Appeal from Suwannee Circuit Court.

This case was decided at Tallahassee.

A statement of the case is contained in the opinion of the Court.

John A. Warrock and *A. A. Knight* for Appellant.

The appellant excepts to the charges of the Judge in the court below, and insists that a weapon carried on the person so as to be seen, does not come within the statute, "secretly." Thomp. Dig., 498.

That in this case the pistol was partly in the band of the pantaloons and partly out, so that it could be seen by any and all, and therefore not concealed. Ibid.

That the proviso means any pistol outside of all his clothes, so that it may be distinguished. Ibid.

The Attorney-General for the State.

BAKER, J., delivered the opinion of the Court:

This is an appeal from the Circuit Court for Suwannee county.

The defendant was indicted, tried and convicted for carrying arms secretly, and fined twenty-five dollars.

The witness, Joseph Stewart, testified on the trial of the case that he met the defendant on the road from Houstoun; passed close by him; saw the butt of a pistol sticking out of his pants; sometimes his coat covered the pistol, at other

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times not; saw the defendant on another occasion with the same pistol in his hand; knew it to be the same; the defendant did not put it under his clothes but laid it on the table, &c.

The court charged the jury that if they found at any time the pistol was covered by the coat, or if it was stuck in his pants and a part of it exposed, "that, under the statute, it was not carrying arms openly outside of all the clothes."

The defendant's counsel excepted to the charge of the court, and "insisted" that a "weapon carried on the person so as to be seen, does not come within the statute "secretly;" 2d, that the proviso means "any part of the pistol outside of all the clothes so that it may be distinguished."

The statute under which this indictment was found provides, "that hereafter it shall not be lawful for any person in this State to carry arms of any kind secretly on or about their person, &c.: *Provided*, that this law shall not be so construed as to prevent any person from carrying arms openly outside of all their clothes." Th. Dig., 498, §5.

The Legislature by which this act was passed evidently attached to it more than usual importance, regarding the enforcement of its provisions as necessary for the protection of human life, and for the preservation of the peace and good order of the State. And to secure this desired end they made it the "duty of the Judges of the Circuit Courts in this State, to give the matter contained in this act in special charge to the Grand Juries in the several counties in this State, at every session of the court." Thomp. Dig., 498.

The statute was not intended to infringe upon the rights of any citizen to bear arms for the "common defense." It merely directs how they shall be carried, and prevents individuals from carrying concealed weapons of a dangerous and deadly character, on or about the person, for the purpose of committing some malicious crime, or of taking some undue advantage over an unsuspecting adversary. When

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no such evil intentions possess the mind, men in vexed assemblies or public meetings, conscious of their advantage in possessing a secret and deadly weapon, often become insulting and overbearing in their intercourse, provoking a retort or an assault, which may be considered as an excuse for using the weapon, and a deadly encounter results, which might be avoided where the parties stand on a perfect equality, and where no undue advantage is taken.

We have seen that the Legislature, in view of the public policy which called for the passage of this act, in the most emphatic manner, makes it the duty of the Judges of the Circuit Courts in the State to use all their legitimate powers for the purpose of having this law enforced in every locality or county, strictly in accordance with its spirit and meaning, and in view of the mischief it was intended to remedy.

It is urged by the counsel for appellant, that if any part of the weapon can be seen, it is not carried secretly within the meaning of the statute. If there could be any doubt about the proper construction to be given to this part of the statute, it would be removed by the clear and explicit language used in the proviso, which only authorizes arms to be carried openly outside of all the clothes.

The carrying of weapons, therefore, about the person, in any other manner, is illegal, and makes the party liable to the penalties imposed by the statute.

In the case before us, the pistol was at all times partially concealed by the pants, and sometimes entirely concealed by the coat, which brings this case within the very letter of the statute.

The charge of the Judge in the Circuit Court was in accordance with the law, almost in the exact language of the statute. The verdict of the jury is fully sustained both by the law and the evidence.

The judgment is affirmed with costs.

Ochus vs. Sheldon, Hoyt & Co.—Argument of Counsel.

A. A. OCHUS VS. SHELDON, HOYT & Co.

1. The rule of Court which prescribes that unless the declaration be filed by the first day of the second term, the cause shall be dismissed, is not mandatory upon the Court, but is only a right of privilege accorded to the defendant, to have the same dismissed upon motion.
2. A waiver of *præcipe* and summons and an acknowledgement of service, endorsed upon the declaration, is not to be so construed as to deprive the defendant of his right to make defence to the suit.
3. Both by the rule of the common law and by the statute of Florida, a Judge is precluded from sitting on the trial of any cause in which he may have a pecuniary interest. Whether under the second section of the Act of 1862, the defendant may waive the objection. Query?

This case was decided at Tallahassee.

Appeal from Suwannee Circuit Court.

McLeod & Broome for Appellants.

The following are the material points in the case:

The appellant, on the 26th day of Dec., 1866, made a certain promissory note in writing, as follows:

\$561. One day after date I promise to pay to the order of Thomas T. Long five hundred and sixty-one dollars, for value received, Dec. 26, 1866.

A. A. OCHUS.

The said note was thus endorsed:

“Pay to the order of Sheldon, Hoyt & Co., waiving protest and notice:

THOS. T. LONG.”

On the 4th day of April, 1867, the said Sheldon, Hoyt & Co., by their attorney, Jesse Finley, presented to appellant a declaration declaring on the beforementioned note, with this endorsement on same:

“I waive *præcipe* and summons, acknowledge service, and agree that the fall term of this court for 1867, shall be judg-

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ment term, April 4th, 1867.” And the appellant was asked to sign same, which it appears was done.

On Monday, the 21st day of October, A. D. 1867, the Fall Term of the Circuit Court in and for Columbia county of the Suwannee Circuit, was opened.

On Wednesday the 23d, the third day of the term, the papers in the case were filed and the case called, and the court entered the following order:

“Judgment by default, clerk to assess, Oct. 23d, 1867, stay of execution to Dec., 1867.” The appellant objecting and tendering the following errors:

First. That in waving *praecipe* and summons and acknowledging services as endorsed on the back of the declaration, the said Ochus did not waive any other of his legal rights of defense or requirements of the law as contained in the statutes and the rules and practice of the court. Now, the plaintiffs, not having filed their declaration in accordance with the law and the rules and practice of the court, the said defendant never had his day in court, therefore it was error in the court to grant judgment.

Second. The declaration not having been filed on or before the first day of the second term, there was not legally a case in court, therefore it was error in the court to grant judgment.

Third. That the declaration not having been filed on or before the first day of the second term, the suit was, by the operation of the laws and the rules and practice of the court, dismissed, and the court erred in granting judgment.

Fourth. That the consent endorsed on the back of the declaration that the Fall Term, A. D. 1867, should be judgment term, waived no rights of defense or requirements of the law, save those specifically waived, and the plaintiffs were bound equally with the defendant to conform to the rules of practice and pleading.

Fifth. Forasmuch as the note upon which judgment was

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rendered was made payable to the order of Thomas T. Long, and the said Judge Thomas T. Long, being the Judge who presided upon this judgment, he being an interested party, was disqualified from trying said cause, by interest, (he supposing it was by consent.) Now, as this defendant did not waive this objection, the court erred in granting judgment.

On the 20th of January, 1868, the Judge thus endorsed the errors:

“I hereby certify that the above bill of exceptions is true and contains the decision of this court.

THOS. T. LONG,
Judge C. C. S. C.

“January 20, 1868.”

We submit the following points of law as corrupt and applicable to the cause in argument:

First. The statutes and rules of courts permit a party defendant to have his day in court by providing that the declaration must be filed at least six months before the party defendant can be forced to trial. The lenity of the law gives that time to prepare his defense after he is informed of the charges against him. Thomp. Dig., 330; Rules of Court, heading “Declaration,” parts 1 and 2.

Second. In the event the declaration is not filed on or before the first day of the second term, the suit is by the operation of the law and rules of the court dismissed. Thomp. Dig., 330; Rules of Court, heading “Declaration,” pa. 2.

Third. The declaration not being filed on or before the first day of the second term, there was not legally a suit in court. Thomp. Dig., 330; Rules of Court, heading “Declaration,” pa. 1 and 2.

Fourth. The waiver of *praecipe* and summons and consent, that the Fall Term, 1867, should be judgment term, is an agreement conditional in its nature, and is equally binding upon plaintiffs and defendant, and the express waiver of cer-

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tain named requirements of the law is to the exclusion of those requirements of the law not mentioned. 2 Parsons on Contracts, 27, 28, 49, 50, 52, 53, 189; 7 T. R., 383; Broom's Legal Maxims, 505, 521, marginal; Coke on Littleton, 210, a.

Fifth. An order of court, granted by a Judge disqualified by law is null and void, and a mistake on the part of a Judge is ground upon which a judgment, based on that mistake, will be set aside. Pam. Acts 5th Session of Florida, page 124. Acts 62; 19 John., 172; 13 Mass., 341; 10 Fla., 213.

J. J. Finley for Appellee.

DUPONT, C. J., delivered the opinion of the Court.

The record before us shows the following state of case: At the fall term of the Circuit Court, holden in and for the county of Columbia, the counsel for the appellees, who were plaintiffs in the court below, obtained leave to file a præcipe, summons and declaration in the case, under and by virtue of an agreement endorsed upon the declaration, in the following words, viz: "I waive præcipe and summons and acknowledge service, and agree that the fall term of this court for 1867 shall be the judgment term.

"Signed,

A. A. OCHUS.

"April 19th, 1867."

On the same day, to-wit, on the 23d day of October, the following entry of judgment was made: "And now on this day came the parties, by their attorneys, and the defendant saying nothing in bar or preclusion of the plaintiffs demands: It is ordered and adjudged that the plaintiffs do recover of the defendant and that the clerk do assess the damages."

It is also made to appear that the cause of action sued upon is a promissory note made payable to the Judge who presided, and by him endorsed to the plaintiffs.

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The substance of the errors assigned is as follows:

“1st. That the declaration not having been filed on the first day of the second term, the case stood as dismissed under the rules of court.”

2d. That in waiving *præcipe* and summons and acknowledging service, as endorsed on the declaration, the defendant did not waive his legal right to make defence to the action.

3d. That the presiding judge was disqualified by interest from sitting on the trial of the cause.

We now proceed to consider, in their order, the several errors assigned. And first, the 15th rule adopted for the regulating of proceedings in the Circuit Courts, provides that “all declarations must be filed on or before the first day of the term, and if not filed by the first term thereafter, the suit shall be dismissed.”

The record shows that the declaration in this case was not filed until the third day of the term, and it is insisted in argument that, under the operation of this rule, the case was *ipso facto* dismissed and the cause out of court. We think that this construction of the rule is too stringent, and that the rule was designed only to give to the defendant a privilege, of which he might or might not avail himself.

In the record before us there is nothing to show that any objection was taken by the defendant in the court below, but there is the most conclusive evidence contained in the entry of the judgment itself that both parties were present by their counsel, and that the defendant said “nothing in bar or preclusion of the plaintiff’s demand.” In this state of case we think that the defendant, having neglected to claim his privilege in the court below, cannot be permitted to do so in this court. The first assignment of error, is therefore, overruled.

The 2 derror assigned is, “that in waiving *præcipe* and summons, and acknowledging service as indorsed on the declaration, the defendant did not waive his legal right to

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make *defence* to the action.” The proposition contained in this assignment of error is undoubtedly correct, and were it sustained by the history of the case as detailed in the record, would be conclusive of the cause. But in no part of that record does it appear that the defendant made any effort to defend, or that he was debarred from this legal right by any ruling of the court below. As it comes before us unsustained by any facts contained in the record, it is simply the enunciation of an abstract proposition and has no bearing upon the case, and as this court deals only with the facts of the case, as authenticated by the record, this assignment is also overruled.

The 3d error assigned is, that the judge who presided at the rendition of the judgment was interested in the result of the suit. This assignment is abundantly sustained by the facts as set forth in the record, for it is there shown that the note which constituted the cause of action bears the indorsement (with a special waiver of protest and notice,) of the individual who presided as judge at the trial of the cause.

It is a canon as old as the common law itself that no man shall be permitted to give judgment in his own cause. Vide Black. Com. Book III, page 298, note a. It seems, however, that in proceedings under the common law this objection might be waived by the defendant so as to preclude him from taking advantage of it, (*ib.* note 11,) and such seems to have been the rule in our courts, until the enactment of the statute in 1862, which provides “that no judge of any Court, or Justice of the Peace, shall sit or preside in any cause to which he is a party, or which he is interested, or in which he would be excluded from being a juror by reason of interest, consanguinity or affinity to either of the parties; nor shall he entertain any motion in the cause other than to have the same tried by a competent tribunal.”

The second section of the act provides, “That the judge or justice so incompetent, shall retire of his own motion and

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without waiting for an application to that effect; that any and all judgments, decrees and orders, made by a judge or judges so incompetent, shall be of no force or validity, and are hereby declared to be null and void, except an order for the trial of the cause, as hereinbefore provided." Pamph. Laws of 1862, page 13.

There is no evidence in the record before us, that the defendant had waived his right to object to the presiding Judge as an interested party, even if such waiver be admissible under the construction to be given to the 2d section of the act. And in the absence of such evidence, we think that the objection under this assignment is well taken, and is fatal to the judgment rendered in the court below.

• Let the judgment be reversed and set aside, and the cause remanded for a new trial in the court below.

E. SIMPSON & Co. vs. KNIGHT & FRASIER.

1. An attachment bond executed by an attorney at law, in his own name, binding himself and not his principal, and signed by two good and sufficient securities, is sufficient under the statute to sustain the writ of attachment.
2. The third rule of Court does not conflict with the statute authorizing an attorney at law to sign an attachment bond binding himself and not his principal.
3. The notice required in attachment suits is to enable defendant to appear and plead to the merits of the cause, and not to appear and contest the validity of the writ, and the only limitation to the time of notice is, that no judgment can be rendered before satisfactory proof of such notice.
4. To obtain the writ of attachment it is only necessary to file the proper affidavit and bond with the clerk—a præcipe is not required by law.

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The time of filing the affidavit for attachment is made by statute for all legal purposes the date of the commencement of the suit.

5. The rule of this Court, adopted in 1854, was not intended to regulate the practice in the Circuit Courts. It is directed to the clerks in making up a record to be used in this Court, to copy the papers in the order in which they were originally filed.

Appeal from Suwannee Circuit Court.

This case was decided at Tallahassee.

J. J. Finley, Attorney for Appellants.

James Banks, McLeod and Broome, for Appellees.

BAKER, J., delivered the opinion of the court.

This suit was commenced by attachment in the Circuit Court for Columbia county, in the Suwannee Circuit.

The record shows that the affidavit was sworn to by J. J. Finley, the attorney for Elias Simpson & Charles Johnston, merchants and partners doing business in the city of New York, under the name and style of E. Simpson & Co., and filed on the 1st day of February, 1867. On the same day the attachment bond was filed, signed by the said J. J. Finley, R. T. Gist and A. A. Ochus, and was approved by the Clerk of the Court. Upon the filing of said affidavit and bond, an attachment was issued and levied upon the goods and chattels of Knight & Frasier, the appellees. The return of the Sheriff shows that the levy was made on the 2d day of February.

The attorneys for defendants gave notice that on the 16th day of March, they would make a motion, before the Hon. T. T. Long, to "dismiss and dissolve the attachment."

1st. Because no bond has been properly signed and delivered, as the law required.

2d. That no service of process ever has been made.

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3d. Because there is no præcipe sued out authorizing the issue of writs of attachment.

4th. Because the affidavit is incomplete.

The court, after hearing the argument of counsel on said motion, "ordered and adjudged that the said motion be sustained; that the said writ of attachment be dissolved, and that the suit be dismissed."

The errors assigned are four in number, alleging that the court erred in dissolving the attachment and dismissing the suit upon the exceptions upon which the motion was based. It does not appear from judgment of the court whether all the exceptions taken were sustained, or only a part; it is therefore necessary that all should now be considered.

In the exception taken to the affidavit, it is not shown in what part it is alleged to be "incomplete." Upon examination the affidavit is found to be drawn with the usual professional skill, setting forth all the allegations necessary to sustain an attachment suit, and is sworn to by the attorney for plaintiffs, and inasmuch as the point was not pressed in the argument before this court, we presume it was not relied upon, or wholly abandoned.

The exception taken to the execution of the bond was strongly urged by the counsel for appellees. They insist that the bond could not be legally executed by J. J. Finley, in his capacity as an attorney at law; that the bond required by the statute must be executed by the plaintiff or by his attorney in fact, and to maintain this position rely on the act which provides that no attachment shall issue until the party applying for the same, shall, by himself or by his agent or attorney, enter into bond with at least two good and sufficient securities. Thomp. Dig. 368.

In the case of Conklin & Smith vs. Goldsmith, 5 Fla., 280, the questions arising under this statute were fully discussed. The peculiar phraseology used makes its construction difficult. The court, however, after a careful examina-

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tion arrived at a conclusion and gave a definition of the act which has been received and acquiesced in by the legal profession as well as the legislature, for many years, as the law of the State, and nothing has been presented in the argument on this case to induce this court to overrule that decision. Mr. Justice Semmes who delivered the opinion of the court, said: "The main object of that part of the statute was to protect the debtor from an improper use of the remedy, by requiring two good and sufficient securities to the bond. This object can as well be accomplished when the agent executes the bond in his own name as in the name of his principal."

In the case before us, an attorney-at-law executes the bond and binds himself that he may obtain the writ of attachment for the benefit of his client. Since it has been settled that an agent can sue out a writ of attachment for his principal, by executing the bond in his own name, it seems easy to arrive at the conclusion that the statute confers equal authority upon an attorney-at-law. The reasoning of the court in the above stated case is based in part upon the use of the word attorney in the statute in contra-distinction to the word agent, it being the duty of the court to construe the law if possible, so as to give a meaning and effect to every word and clause in the act. "It could not have been contemplated in the use of the word attorney to imply he should be one in fact, but an attorney-at-law, unless we conceive the folly that after the word agent, the legislature should have seen the necessity of the relative term, conveying the identical same idea. If the word attorney does not mean one at-law, then it must be rejected as unmeaning and superfluous." *Conklin and Smith vs. Goldsmith*, 5 Florida 283.

It is objected to this construction, that an attorney-at-law cannot execute an attachment bond without violating the third rule of court: "That no attorney or other officer of court shall enter himself, or be taken as bail in any criminal

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case, or as security in any attachment, appeal, or writ of error, or other proceedings in court, on pain of being considered in contempt, and of having the proceedings dismissed, on account thereof.” The decision in the case of Love vs. Sheffelin & Co., 7 Fla., has been cited to sustain this objection. Neither the rule nor the decision seem to apply to this case. The rule prevents an attorney-at-law from signing an attachment bond as security, and was doubtless framed in reference to the authority granted under this statute—to make himself the principal.

Chief Justice Baltzell who delivered the opinion in the Love & Sheffelin case, must have been familiar with the decision in the case of Smith & Conklin vs. Goldsmith, and if he had supposed that any conflict existed between the ruling in that case, and the rule of court which he considered so elaborately, he would have made some comment and not pass it over in silence.

In that opinion the Chief Justice gives as reasons for the adoption of the rule, that it was necessary to protect suitors, and to secure them a fair and impartial trial, by preventing officers of the court from voluntarily assuming liabilities, which would necessarily bias the judgment and secure them as active partisans on one side or the other of a cause, and perhaps enable them to impede or prevent the great ends of justice. Love vs. Sheffelin & Co., 7 Fla.

This reasoning certainly applies with great force to many of the officers of the court, but not so clearly to attorneys-at-law; who generally have the very strongest motives for espousing one side or the other of every cause they undertake. Motives higher and stronger than mere personal liability for costs, and it does not follow that they thereby impede and prevent the great ends of justice. The statute by conferring this authority seeks to secure and does not tend to impede or prevent the ends of justice as the remedy afforded by attachment would in many cases be unavailing, if the absent

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creditor is required to furnish a special authority to execute the necessary bond, in anticipation of the debtors fraudulent acts.

The next exception taken, was, that no process was served on the defendants. That under the act of 1833 the defendants were entitled to notice of the issuing of the writ of attachment. It is true that the statute does require notice to be served personally or by publication, when the property attached is not replevined; and further that such notice shall require all persons interested, to appear and plead to the declaration filed in such case, and it shall and may be lawful for the court, upon satisfactory proof of such notice, and upon the finding of the jury of inquest to be called for that purpose, to award their judgment upon said finding.—*Tho. Dig.*, 369, sec. 3.

The object of the notice required is not to notify the defendant to appear and contest the attachment by motion to dissolve or quash the writ, and can in no way affect its validity. The notice is to appear and plead to the declaration filed in the case, to give the defendant an opportunity to set up any defence he may have to the plaintiffs' cause, or in any legal way contest the validity of the claim against him.

The statute fixes no time when such notice shall be given, and the only limitation or restriction in the act is that the plaintiff cannot obtain his judgment until he has made satisfactory proof of notice.

The only remaining exception for consideration is "That no præcipe was sued out authorizing the issue of the writ of attachment."

The attachment law passed in 1834, clearly specifies all the conditions required of the Plaintiff to enable him to sue out a writ of attachment. He must by himself or by his agent or attorney, first file with the clerk an affidavit and bond in the manner and form provided in the act; but no

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præcipe is required or mentioned, either in this statute or in the act regulating pleadings in attachment suits, which directs that the filing of declaration and other proceedings shall be governed by the same rules as pleadings in other suits at law. Tho. Dig., 369.

The act approved November 23, 1828 requires, that in all personal actions a memorandum or præcipe shall be filed with the clerk before summons can be issued to the defendant. In the second section of that act, the clerk is required to transcribe such præcipe in a book to be kept for that purpose, before issuing the summons, "and to make in said book a similar memorandum of cases commenced by attachment, which præcipe or memorandum shall have date on the day when said præcipe is received by the clerk, or when the affidavit is filed with him to obtain process against the estate of defendant."

The statute here makes a clear distinction between the manner of commencing a suit against a person and against the estate of the defendant. In the one case the præcipe is required to be filed and recorded before a summons can issue to the person; in the other, the filing of the affidavit is the first act necessary to obtain process against the estate of defendant; and the date of filing the affidavit as well as of filing the præcipe is made by statute, for all legal purposes, to be the time when such suits can actually commence. Thomp. Dig. 325.

The rule of this court adopted in the year 1854, has been quoted as authority to sustain the position that a præcipe is necessary before an attachment can issue. Such was not the intention of the court, and we do not see how the rule can admit of any such construction; it was adopted to remedy the careless and irregular manner in which records were often sent up to this court. It requires "first the præcipe and summons, affidavit and bond for attachment and other proceedings, with the writ issued thereon with return; sec-

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ond declaration and other pleadings," &c. The obvious meaning of the rule is that when a suit is commenced by præcipe such præcipe with the summons shall be placed first on the Record and when commenced by affidavit and bond for attachment or replevin suits, such affidavit and bond with the writs issued thereon shall be entered first on the record; then follows the declaration and other pleadings. The rule does not pretend to regulate any practice in the Circuit Courts. It merely directs that the papers in the court below shall be copied into the record in the order in which they were originally filed.

Having thus fully considered all the questions presented by the record for our decision, it is our opinion that the assignment of errors by appellants was properly made, and that the Judge of the Circuit Court erred in sustaining defendants' motion to dissolve the attachment and dismiss the suit.

It is therefore ordered that the judgment be reversed and the case remanded to the Circuit Court for further proceedings.

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1. The separation of a juror from his fellows, after the jury have been sworn, and before they have rendered a verdict, without the consent of the Judge, will not "*per se*" avoid the verdict. It will amount to a contempt of court on the part of the juror, for which he may be punished by fine or imprisonment, or both.
2. When a juror separates from his fellows after he has been sworn and before verdict, without the consent of the court, and it can be shown that during the separation there is a reasonable cause to apprehend

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that some improper practice had taken place, or some undue influence exerted over the juror, it will be the duty of the court, in the exercise of sound discretion, to set aside the verdict and award a "*venire de novo*."

3. A verdict should never be set aside for a juror's misbehavior towards the court, unless it is prejudicial to one or other of the parties.
4. In trials for offences punished capitally, the conduct of a juror who separates from his fellows, should be subjected to the most rigid scrutiny in order to ascertain if it was blameless while separated from his fellows, and the verdict should only be allowed to stand when the prosecution can show that there was no opportunity to tamper with the juror, or to influence him in finding his verdict. In all cases other than capital felonies, the verdict should stand, unless the party, against whom it is given can show improper influences were used to produce it.
5. When a person is called as a juror, he may be examined on "*voir dire*" and asked whether he is twenty one years of age? Whether he has the requisite property qualifications? Whether he is interested in the result of the suit, or is of kin to either of the parties? And whether he is a citizen? and, indeed, all the questions that are pertinent, the answer to which will not tend to degrade the juror, or be to his dishonor or discredit. In prosecutions for felony, he may be further interrogated as to whether he has made up and expressed an opinion as to the guilt or innocence of the accused.
6. If parties in civil suits, or the accused in criminal prosecutions, omit to enquire into the qualifications of a juror when he is called to the book to be sworn, and to make objection to him before he is sworn, it will be too late to raise the objection after he has been sworn.
7. When a party has the right to object to a juror in civil suits, or to challenge him in criminal prosecutions, and neglects or omits to do so before the juror is sworn, it would require a strong case of hardship to induce the court to interfere to set aside a verdict and award a "*venire de novo*."
8. An appellate court will relieve a party by setting aside the verdict and awarding a "*venire de novo*" where one of the jurors who served on the trial had been convicted of an infamous crime, which fact was unknown to the party at that time of the trial, and about which he would not be allowed to enquire on "*voir dire*." Juries must be "*probi et legales homines*."
9. A large discretion is vested in the Judge who tries the cause in the court below; and if from any cause the mind of a juror is not in a proper and fit state to render an impartial verdict, the Judge who pre-

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sides at the trial, in the exercise of a sound legal discretion, should award a "*venire de novo*," in order that the ends of justice may be attained.

10. The incompetency that will authorize the court to interfere after a juror has been sworn, must be of such a character as would defeat a fair and impartial trial, if the juror is permitted to serve or the verdict is allowed to stand.

11. A fixed domicile of the juror in the county in which the court is held, without regard to length of time of such domicile, is sufficient to constitute the party a juror, and neither the want of length of residence or qualification as a householder, is such an objection to a juror as will justify the setting aside a verdict.

Appeal from Nassau Circuit Court.

This case was argued at Lake City and decided at Tallahassee.

James Banks for Attorney General, for the State.

C. P. Cooper for James Madoil.

1st Exception: Wills' Circumstantial Evidence, pages (marginal) 161, 150.

2d Exception: Arch. Crim. Prac. and Plead., vol. 1, (6th edition by Waterman) pages 125, 125-1, 125-2, 125-3, 125-4.

3d Exception: Plee. Sup. Ct. Rep., vol. 5, page 285; Simon, a Slave, vs. The State of Florida, Ga. Sup. Court Rep., vol. 10, page 512.

4th Exception: Bill of Rights, Constitution of Florida of 1865; page 441, Case of Holden vs. The State 18th, Ibid.; page 511, Berry vs. The State.

5th Exception: Thompson's Dig., 344 and 345; Fla. Sup. Ct. Rep., vol. 9; O'Connor vs. The State, page 215; Constitution of Florida, Art. 6, Sec. 1.

6th Exception: Fla. Sup. Ct. Rep., vol. 9; Cato, a Slave, vs. The State, page 163; Ibid. O'Connor vs. The State, page 215; Ga. Sup. Ct. Rep., vol. 10, page 512.

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A statement of the case is contained in the opinion of the court.

DOUGLAS, J., delivered the opinion of the Court.

At the Spring Term of the Circuit Court for Nassau county, Suwannee Circuit, the appellant, James Madoil, was indicted for larceny in feloniously taking and carrying away a sail of the value of forty dollars. On the trial the accused was convicted and sentenced to pay a fine of \$200. On a subsequent day of the term, a motion was made in arrest of the judgment, and the following reasons assigned:

1. That the jury adjourned and separated without the consent of the accused or the order of the Judge, before rendering a verdict, and were not during the adjournment and separation in charge of an officer.

2. That one or more of the jurors were not householders.

3. That one of the jurors had not been a resident of Nassau county but for three months, although a citizen and resident of the State of Florida for twenty-four years. These are the facts presented by the record, though on the argument at bar other facts and circumstances were mentioned as having taken place on the trial in the court below.

Before proceeding to decide the only questions raised and presented by the record, we must again animadvert upon the imperfect manner in which the records are brought to this court from the court below. It is frequently made known to this court in argument, that important decisions and rulings have been made in the court below, on the trial of a cause, yet the record shows nothing of the facts on which these rulings and decisions were made, and it may thus well happen that injustice is done to parties because this court is not put in possession of the necessary information to enable it to decide the matter understandingly. We have often called the attention of the profession to the im-

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portance of presenting, by a proper bill of exceptions, all facts which are not necessarily a part of the record, and which are relied upon as proper and necessary to a correct decision of the case. Our books of reports contain numerous decisions on this subject, and we again call the attention of the members of the bar to the decisions made by this court on the subject.

The clerks of the Circuit Courts, in many cases, are without experience, and they should receive aid and instruction from the attorneys who conduct the case in court. It too often happens that counsel suppose their duty ends when they have conducted a suit in court to judgment.

The argument of a cause is by no means all the duty counsel owe to clients. It is quite as important that the record should be properly made up, so that the judgment, when obtained, will be secure from defect in the appellate court, because of an imperfect record. To this end it is proper that counsel should supervise the entries made of record in the progress of a trial, and if the judgment is appealed from, it is important that he should have a proper record for the appellate court to pass upon. In this case there is no bill of exceptions showing what transpired on the trial, and the reasons assigned as ground for the motion in arrest of judgment are not supported by a bill of exceptions setting forth the facts on which the motion is based. Under this state of facts we might well affirm the judgment of the court below, without considering the grounds assigned for arrest of the judgment, as they do not appear upon the record, and are based upon facts which could only become a part of the record by a bill of exceptions, signed and sealed as the law directs; yet as we may infer that the circumstances stated in the motion did occur, we will proceed to decide the questions raised.

In considering the first question raised for our decision, we find on examination that the weight of authority is

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greatly against the position assumed by the counsel for appellant. The question was settled in England at an early date, and so far as we can see, remains unchanged up to the present time.

The rule in the English courts as established by repeated decisions, seems to be this: That after a jury has been selected and sworn, and the cause submitted to them for their consideration, if they separate without the consent of the court, such separation will amount to a contempt of court on the part of the jury, but it will not be good ground to make the verdict void, unless it is shown that during the separation there is cause to apprehend that some improper practice had taken place, and that by mixing with the multitude undue influence had been exerted over them, and that their verdict had been, or possibly might have been, influenced by communicating with others. If such proof should be made, or if there should be well-founded apprehension that the juror had yielded to improper influence, it would be the duty of the court to set aside the verdict, and to punish the misbehaving jurors. But in the absence of all such proof, there can be no good reason for setting aside the verdict on the ground that the jury had separated before they were properly discharged by the Court. A verdict, it is said, should never be set aside for a juror's misbehavior towards the court, unless it is prejudicial to one or other of the parties. 1 Halstead's Rep., 110.

In the case of the King vs. Woolf et al., 1 Chitty's Rep., 401, Abbott, Chief Justice, said: "The only difference that can exist between the fact of the jury separating with or without the approbation of the Judge, as it seems to me, is this, that if it be done without the consent or approbation of the Judge, express or implied, it may be a misdemeanor in them, and they may be liable to be punished; whereas, if he gives his consent, there will be no such consequence of a separation." See also 6 Term Rep., 530.

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The rule in the English courts seems to be the same in civil and criminal cases. 1 Chitty's Crim. Law, 643, 529. They make no distinction between felonies of the highest grades, such as treason and homicide, and civil suits between parties. The Judge looks to see if there is any reason to believe that the jury have yielded to improper influences, and if there is no such proof or charge, the verdict will stand though the jury may be punished for a misdemeanor.

In support of the position that the separation of the jury will not avoid the verdict, if there is no impropriety on their part, see the following cases: The State vs. Babcock, 1 Con. Rep., 401; Hawkins' Book, 2, Ch. 22, Sec. 18; Bacon's Abrid. Title Jurors, letter M, page 2; 2 Hall, 306; Croke James, 22; 2 Bain & Ald., 462; 1 Chitty's Crim. Law, 629; Winslow vs. Draper, 8 Pick., 170; The State vs. Prescott, 6 New Hamp., 287; 2 Southrad's Rep., 827.

Having shown what is the rule of decision in the English courts on this subject, we will now examine the decisions of some of the courts of this country.

The American cases are not uniform in their rulings, yet it is believed that in general they agree with the decisions of the English courts.

The case of McCoul, decided by the General Court of Va., the highest criminal court in the State, is the leading case against the rule as established by the English courts, but has not generally been adopted as law by the courts of the other States. In that case the general court held, that the separation of the jury was sufficient cause for vitiating and setting aside the verdict. McCoul was put upon his trial for grand larceny, and was convicted by the jury. It was afterwards made known to the court by affidavits, that during the trial and before verdict rendered, two of the jurors had separated from their fellows. One of them on the second day of the trial, had gone to the house at which he boarded, against the remonstrance of the officer in charge of the jury,

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and remained absent about 20 minutes. Another jurymen, in the morning of another day of the trial, attended by the officer, went to visit a sick child. They were absent about twenty minutes, and the officer remained below whilst the jurymen went up-stairs to see his family, and was absent from the presence of the officer about five minutes. The General Court decided that such a separation as was proved in this case was sufficient cause for setting aside the verdict. See 1 Virginia Cases, 304.

This was the first case on this subject decided by the courts of Va., and they have steadily adhered to the decision then made, in subsequent cases.

In the State of New York, the rule of decision has been different. In the case of "The People vs. Douglass," which was a trial for murder, 4 Cowan's Rep., 33, 34, 35, Judge Woodworth says: "On looking into the books, we do not find that mere separation of the jury has been held sufficient cause for setting a verdict aside, except in the case of The Commonwealth vs. McCoul. This case does go the length of saying that the court should guard against the possibility of abuse by setting aside the verdict, if any of the jury depart from the control of the officer. But the court does not profess to go upon any adjudged case in England, and we think the English cases are founded on the better reason. These are uniform, that though the jury separate, if there be no further abuse, this shall not vitiate the verdict, though it would be a contempt of court, if contrary to their instructions, and would be punishable as such." In the case of the "People vs. Douglass," though the court held that the mere separation of the jury, without any further abuse, is not sufficient ground for setting aside the verdict, the court, notwithstanding, decided unanimously, that sufficient cause existed in that case for granting a new trial. The allegation on the part of the prisoner was, that

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two of the jury not only separated from their fellows, but also drank whiskey, and conversed freely on the subject of the trial.

In South Carolina it has been adjudged legal, when a trial for felony was suspended at night, to suffer the jury to disperse till the next morning. See *Anderson's Case*, 2 *Bailey's Rep.*, 565. See also 1 *Penn. Rep.*, 278; 1 *Halstead's Rep.*, 110; *State vs. Babcock*, 1 *Conn. Rep.*, 401; *Burrell vs. Phillips*, decided in the U. States Circuit Court by Story, J., 1 *Gall. Rep.*, 360; 3 *John Rep.*, 252; 1 *Cowen's Rep.*, 221.

These decisions are in confirmation of the law as laid down by Chief Justice Abbott, in the case of the *King vs. Woolf et al.*, and proceed upon the principle that the separation of the jury is not *per se*, a sufficient cause for setting aside and avoiding the verdict, but that there must be some proof showing cause to apprehend that some improper practice has taken place while the jury separated, calculated to influence their verdict, or that by mixing with the multitude they were subjected to improper influences. In the absence of such proof or suggestion, the verdict will stand though the court may punish the misbehaving jurors.

In some of the States the courts have made a distinction between capital felonies and other offences, in the application of the rule. While we do not find this distinction supported and sustained by the weight of authority, yet in trials for offences punished capitally, where one or more of the jury separate from their fellows, we think it should be shown that the separation was from urgent necessity, and that no opportunity was offered for any improper or undue influence. In such cases the conduct of the absent juror should be subjected to the most rigid scrutiny, in order to ascertain if it was blameless while separated from his fellows, and the verdict should only be allowed to stand when the prosecution can show that there was no opportunity to tamper with

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the juror, or to influence him in finding his verdict. In all other cases other than capital felonies, the verdict should stand, unless the party against whom it is given can show improper influences were used to produce it.

The case of the People vs. Douglass, and The State vs. Babcock, above cited, were trials for murder; also the case of the Commonwealth vs. Knapp, 10 Pick. Rep., and Anderson's Case in 2 Bailey's Rep., 565. In each of these cases the court held that the separation of a jurymen from his fellows, was not *per se*, sufficient cause to avoid the verdict.

Courts charged with the administration of the criminal law, cannot be too vigilant in guarding the rights of the accused, and also in securing to the State a fair and impartial trial. To this end, efficient and trustworthy bailiffs should be appointed to attend upon the jury, and both the jury and the officer having them in charge should be instructed as to their duty when out of the presence of the court.

No higher offence can be committed against the administration of justice than misbehavior on the part of jurors after a case has been committed to their charge.

In this case the record shows that the Judge who presided on the trial, when it was made known to him that the jury had separated, instituted a strict inquiry into their conduct, and was satisfied from the proofs that there had been no misbehavior on the part of the jury, as indeed none had been charged.

The remaining error assigned is, that one or more of the jurors were not house-holders, and that one of the jury had not been a resident of the county in which the trial took place more than three months, though a resident and citizen of the State for about twenty-four years.

As the question presented in this case is of frequent occurrence in the courts of this State, we shall examine it at

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more length than the case immediately under consideration would seem to require.

When a person is called as a juror he may be sworn on his "*voir dire*," and asked whether he is twenty one years of age, whether he is a householder, whether he is interested in the result of the suit or is of kin to either of the parties? and whether he is a citizen; and, indeed, all questions that are pertinent, the answer to which will not tend to degrade the juror or be to his dishonor or discredit.

In prosecutions for felony, he may be further interrogated by the court at the suggestion of the accused, as to whether he has made up and expressed an opinion as to the guilt or innocence of the accused, and the character of this opinion as to whether it is a fixed opinion, or only a hypothetical opinion that will yield to evidence given on the trial. If the parties in civil suits, or the accused in criminal prosecutions, omit to make the objection to a juror before he is sworn, it will be too late to do so after he has been sworn.

There was formerly much doubt expressed in the books as to whether a juror might be asked in prosecutions for felonies, if he had made up an opinion against the accused, or if he had any prejudice against him.

In the case of *The King vs. Edmonds et al.*, 4 Barn. & Ald., 471, after conviction upon an indictment for a conspiracy, the defendants moved for a new trial upon various grounds. One was the refusal to allow the prisoners to ask jurymen as to supposed expressions by some of them, showing opinions hostile to the defendants and their cause. There was no attempt to prove any such expressions by extrinsic evidence, but it was proposed to obtain the proof by questions put to the jurymen themselves. The Judge who tried the case refused to allow such questions to be answered, and the court of King's Bench held that he was right in this refusal. Abbott, Chief Justice, delivering the opinion of

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the court, said: "The authorities showed that the juryman himself was not to be sworn when the cause of challenge tended to his dishonor; and it was a very dishonorable thing for a man to express illwill toward a person accused of a crime in regard to the matter of his accusation." On the trial of Peter Cook, for high treason, 13 Howell's State Trials, 334, the court held, that the juryman could not be asked on "*voir dire*," whether he had said he believed the accused guilty, and such seems to be the settled law of England at this day.

In the case of the State vs. Baldwin, 1 Constitutional Rep., 289, it was decided in South Carolina that the accused could not compel a juror to declare whether he has formed in his own mind an opinion as to the guilt or innocence of the prisoner in regard to the offence with which he is charged; but if the juror has expressed such an opinion, upon due proof of such declarations, he should be rejected as unworthy to sit upon a trial where the life of a man is concerned. This has ever since been the rule in South Carolina; see The State vs. Sims, 2 Bailey's Rep. 29, and The State vs. Crank, *ib.*, 66. In Pennsylvania the same rule prevails, 4 Yates, 267. In New York and Virginia the rule is different; 7 Cowen's Rep., 125; 2 Va. Cases, 378. The leading authority on this subject is the opinion of Chief Justice Marshall on the trial of Aaron Burr. On this trial the accused was allowed to ask the jurors, as they came forward to be sworn, if they had formed and expressed an opinion as to his guilt or innocence. Since that time most of the States have followed the rule as laid down by the Chief Justice; it is the settled practice in the Federal Courts, and may be considered as the established law in this country.

We have thus seen what are the rights of parties, and what questions may be propounded to jurors in civil suits, and in prosecutions for felonies; and we have already shown if a party will not take his challenge before the juror is

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sworn, he can never afterwards be allowed to challenge for a cause existing before he was sworn; 3 Burrow's Rep. 1858.

"Were a defendant allowed to take his challenge to the jurors after the trial, he never would do it before, but would always rather depend upon moving the court for relief after trial; for if he should be acquitted he would say nothing about the disqualification of the juror, and if convicted, he would avoid judgment by offering his objection. This in fact would be placing him in a situation totally exempt from danger and from punishment, so long as he could get a juror sworn, against whom he could offer any legal objection, and would give him the additional advantage of several chances for his acquittal." See the opinion of Haywood, J., in the case of the State vs. Greenwood, Hayw. Rep. 141.

Where the party has the right to challenge either in civil suits or in criminal prosecutions, and neglects or omits to do so before the juror is sworn, it would require a strong case of hardship to induce this court to interfere to set aside a judgment and award a new trial. There is, however, one case in which an appellate court will relieve a party, and that is, where one of the jurors who served upon the trial had previously been convicted of an infamous crime.—In such a case the party will not be permitted to ask the juror on "*voir dire*" if he has been convicted of an infamous crime, and he may thus be sworn on the jury, and the knowledge of his infamy obtained after he is sworn. In a case like this, it would be the duty of the appellate court to set aside the judgment and award a new trial, for juries must be "*probi et legales homines*."

A large discretion is vested in the judge who tries a cause, and this discretion will not be reviewed when rightfully exercised in furtherance of the ends of justice.

We have already seen from the authorities cited, that the incompetency of a juror is no ground for granting a new trial by this court; and that if the juror is not qualified to

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serve, he must be objected to before he is sworn on the jury; after he is sworn, it will be too late to raise the objection. If, however, from any cause, the mind of a juror who served on the trial is not in a proper and fit state to render an impartial verdict, the court who tries the cause, in the exercise of a sound discretion, should grant a new trial, in order that the ends of justice may be attained.

In the exercise of this discretionary power, courts should be careful not to give too much weight to charges of bias or prejudices made against jurors, but should require satisfactory proof that the charge is well grounded. Incompetency for the want of the requisite property qualification or residence, will not of itself be sufficient cause for setting aside a juror after he is sworn, or for granting a new trial.

The incompetency that will authorize the court below to interfere after a juror has been sworn, must be of such a character as would defeat a fair and impartial trial; of this the court below must judge in the exercise of a sound legal discretion.

In this case, the only incompetency alleged against the jurors is, that one or more of them were not householders, and another had not resided in the county in which the trial was had more than three months. We do not think there were such objections to the jurors as entitled the accused to a new trial.

The judgment of the court below is affirmed.

Hartridge & Co. and Baker & Co. vs. Knight & Frazier—Opinion of Court.

BRYAN, HARTRIDGE & CO., APPELLANTS, vs. KNIGHT & FRAZIER; APPELLEES; C. R. BAKER & CO., APPELLANTS, vs. KNIGHT & FRAZIER, APPELLEES.

BAKER, J., delivered the opinion of the Court.

These cases were commenced by attachment in Columbia County, Suwannee Circuit. On motion before the Hon. T. T. Long, Judge of that circuit, the attachments were dissolved and the case dismissed. The exceptions taken and errors assigned were the same as in the case of E. Simpson & Co. vs. Knight & Frazier, decided by this Court at its present term.

In disposing of these cases it is only necessary to refer to the opinion of the court in that case, where all the points raised by the assignment of errors in these cases has been fully discussed and decided.

It is therefore ordered that the judgment of the Circuit Court dissolving the attachments and dismissing the above stated cases be reversed and the cases remanded to the Circuit Court for further proceedings.

WILLIAM H. JERNIGAN vs. LUTHER & Co.

McLeod & Broome for Plaintiff in Error.

J. J. Finley for Defendants in Error.

DUPONT, C. J., delivered the opinion of the court.

This case was heard at the term of the Supreme Court held at Lake City in February last; and the assignment of errors

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and the facts of the case are identical with those of the case of Adam A. Ochus vs. Sheldon, Hoyt & Co., with the exception that no objection is made on account of the Judge being interested in the result.

The conclusion arrived at, and the views expressed upon the two first errors assigned in that case, are conclusive of this case, and it is unnecessary to reiterate them.

Let the judgment of the Court below be affirmed with costs.

KATE A. WEED, ADMINISTRATRIX, vs. PENELOPE L. STANDLEY.

1. An agreement in writing properly executed, and stipulating that the amount due for rent of land should be paid before the crops are removed, held to be a "security for the payment of money," and under the provisions of the statute to operate as a mortgage.
2. But being a mortgage on personal property, no *lien* is thereby created, unless it is duly recorded in compliance with the requisition of the statute.
3. The act of 1865-6, entitled "An Act for the relief of Landlords," was designed only to enlarge and extend the "remedy" for the collection of rent, and does not interfere with any pre-existing "rights" of the parties.

Appeal from Suwannee Circuit Court.

This case was decided at Tallahassee.

C. P. Crawford and H. Bradford, for Appellees.

O. A. Myers of counsel.

In January, 1867, an agreement was entered into between appellee, P. L. Standley and Reuben Weed, decedent,

Weed vs. Standley—Argument of Counsel.

whereby said Standley leased to said Weed her plantation in Alachua county, known as the James W. Standley place, for the year 1867. The said agreement contains a covenant by said Weed to pay to said Standley therefor the sum of \$1,500, "as follows, to-wit: Seven hundred and fifty dollars (750,) on the first day of December, 1867, and the other half before the crop is removed from the plantation."

On the 22d October, 1867, Reuben Weed died, and letters of administration issued to Kate A. Weed, appellant, on the 11th November, 1867. The sale of the property of the estate was advertised to take place on the 16th Dec., 1867, on which day appellee sued out a distress warrant and levied the same on the corn, cotton and cattle of said estate. The levy was dismissed and the sale proceeded on agreement that \$1,500 of the proceeds be deposited with F. A. Underwood, subject to the order of court, and that the matter be referred to the Circuit Judge to decree either full payment to appellee as a preferred creditor, or pro-rata payment with the other creditors. Afterwards, and before the return of the chancellor's decree, appellant filed in the Probate's office a suggestion of insolvency of said estate. The chancellor decreed *full payment* as to a preferred claim. Appellant moved for a re-hearing, which was had on 16th January, 1868. The chancellor affirmed his previous decree and appellant appealed.

Points, &c.—Every claim against an insolvent estate in Florida must belong to one of the following general divisions, to-wit: 1. "Prior liens;" 2. "Preferred debts;" or 3. "Pro-rata claims;" which are entitled to satisfaction in the order named.

1st Proposition.—A prior lien to be efficacious as such must ante-date decedent's death, to which insolvency relates back, for after legal insolvency, no creditor can, by his own act, enhance his own right to the disadvantage of other cred-

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itors: 2 Williams on Executors, Thompson's Digest, 206, acts of 1853, 106, 8 Howard's U. S. Rep. 111.

2d Proposition.—A prior lien must divest the insolvent's *legal estate*; 10 Peters 612, 2 Wheaton 396, or it must be *res adjudicata*; 11 Fla. 111.

3d Proposition.—The covenants in appellees lease are not a *prior lien* for they do not constitute a mortgage; Thompson 376, 5 Fla., 376, 10 Fla. 133.

4th Proposition.—Appellee's claim is not a "preferred debt," being omitted from class by the act of 1853, p. 106, and expressly excluded by act of 1828; Thompson, 206.

(*Note.*—The policy of the law has so uniformly condemned the barbarous discrimination between *specialty* and simple *written* contracts, that positive enactment alone can re-establish it.)

Does the *Distress Warrant* except appellee from the class of pro-rata creditors?

5th Proposition.—Apart from the act of 1866, p. 61, distrainer takes no advantage from the writ; because,

1st. The warrant being a quasi execution, was *illegal* as contravening the act of 1828, Thompson 205, protecting administrators for six months.

2d. It is contrary to equity, which enjoins the prosecution of individual claims and suspends *post mortem* liens against insolvent estates; (1st prop.) 2 Williams on Executors, 8 Howard 111.

3d. It is repugnant to the act of 1853, which prescribes the manner of establishing claims, order of payment, &c., and gives time to marshall claims, and ascertain their order of precedence and so protects the administrator against *devastavit*.

6th Proposition.—The act of 1866, p. 61, creates no preference for appellee, because,

1st. Being simply declaratory it creates nothing, but leaves the rights and remedies of parties as before, subject

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to the insolvent act of 1853 and the act of 1828 protecting administrators from compulsory payment; Bacon's Abridg't. title "Distress."

2d. To do so would, *pro tanto*, annul the acts of 1853 and 1828, whereas the act of 1866 has no *words of repeal*; 5 Fla. 185, 11 Fla., 111.

3d. The act of 1866 relates strictly to *remedies* and does not seek to alter or enhance rights. "*Rights* are not enhanced by superiority of *remedy*;" 9 Peters 743, 10 Peters 614.

7th Proposition.—The act of 1866 does not, *pro tanto*, repeal or in anywise modify the act of 1853, but is itself limited by that act; the former being general in its character and applicable *inter vivos*, whereas the latter is exceptional in its nature and applies only to the estates of dead insolvents, *in gremio legis*.

The insolvent law is exceptional; (1) in providing a peculiar tribunal for determining claims, to-wit: Probate and administration; (2) in providing quasi adjudications, to-wit: "allowance of claims;" (3) in creating and grading liens by "preference and pro-rata;" (4) in abrogating executor's lien; (5) in suspending *post mortem* liens; (6) in annulling all prior liens except mortgages and judgments; (7) in making the administrator trustee or assignee for benefit of creditors instead of representatives of decedent; (8) in forbidding the "race of diligence" among creditors.

Quere.—Can a lien really exist at all on insolvents estates or any other property *in gremio legis*?

Note.—The common law order of payment is, 1st. Debts to the Crown. 2d. Debts by statutes. 3d. Debts of record. 4th. Debts by specialty. 5th. Debts by simple contract.—1 Swift's Digest, 459.

J. B. Dawkins for Appellee.

1. The deed of lease has all the requisites of a statutory mortgage. See acts of 1838 and 1853.

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2. If the Court should come to the conclusion that it is not a mortgage, then it is insisted that there is a special "*lien*" under the act of 1866, in reference to Rents.

DUPONT, C. J., delivered the opinion of the court.

The argument on this appeal was heard at the term of the Supreme Court, recently held at Lake City, and the case was taken under advisement.

The record shows that on the 21st of November, 1866, an agreement in writing was entered into between the appellee and one Reuben Weed, the intestate of the appellant, whereby the appellee agreed to rent to the said intestate for, and during the year 1867, and for the consideration of fifteen hundred dollars, a plantation located in Alachua county, in this State. This agreement is shown to be under seal, and its execution to have been attested by two witnesses. There is also an express stipulation contained in the agreement, that one-half of the stipulated rent was to be paid on the first day of December, 1867, "*the other half before the crop is removed from the plantation.*"

The record further shows, that Reuben Weed departed this life on the 22d day of October, 1867, and that administration was granted to the appellee soon thereafter. It is also shown that on the 16th day of December, 1867, a distress warrant was sued out at the instance of the appellee, and was levied on the corn, cotton and other property on the plantation, to satisfy the amount of the said rent, which then remained all due and unpaid. It is further made to appear that after the appellant had entered upon the administration, she becoming satisfied that the estate was insolvent, filed in the Court of Probate a written suggestion of the fact, and asked that the debts of the estate should be settled *pro rata*.

Upon this state of facts, the parties made up an agreed

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case to be submitted to the adjudication of the Judge of the Circuit Court. The point to be adjudicated was, whether this claim for rent was to be paid in full, or to come in for its *pro rata* share, with the other debts against the estate. The court decided that the claim was protected by a special lien, growing out of the written agreement, and that it was to be paid in full. It is from this decision that the appeal is taken and now brought here for our adjudication.

The counsel of the appellee bases her claim to priority of payment upon two propositions: First, that the agreement in writing is essentially a statutory mortgage, and created a special lien upon the crops to be made upon the plantation, from the date of its execution. And, secondly, that by the provisions of the statute entitled "an act for the relief of landlords," (Pamp. Laws of 1865-6, page, 61,) a special lien upon the crops is given, which takes the claim for rent out of the operation of the act providing for the distribution of insolvent estates. The relevancy of these propositions to the case before us will be seen by reference to the case of "Kimball, Sheriff, &c., vs. Jenkins, Adm'r," reported in 11 Fla. Rep.; 111, wherein this court ruled that the words "all other claims or demands" occurring in the act of 1853, (providing for the distribution of insolvent estates,) are not to be construed as vacating prior existing liens, whether the same arise from contract or are given by mere operation of law.

In considering the first proposition we are inclined to the opinion that, under the very comprehensive terms of the statute which designates what character of writings shall be held to be mortgages, the agreement between these parties was of that character. The stipulation contained in the written agreement that the rent should be paid before the crops should be removed from the plantation, was manifestly designed to "secure the payment of the money," which should become due for the use and occupation of the same,

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and brings this paper within the very words of the statute. (Thomp. Dig. p. 376.) But though held to be a mortgage, it does not follow that any lien was thereby created, until all the conditions of the statute had been complied with. The crops to be grown on the plantation, upon which it was the design to create a lien, was of that class of property designated as personal; and the statute expressly provides that "no mortgage of personal property shall be effectual or valid to any purpose whatsoever, unless such mortgage shall be recorded in the office of records for the county in which the mortgage property shall be at the time of the execution of the mortgage, or unless the mortgaged property be delivered at the time of the execution of the mortgage, or within twenty days thereafter, to the mortgagee, or Thomp. Dig. 183. The record in this case furnishes no evidence that this paper was ever admitted to record, so that of whatever benefit it may be to the appellee, as evidence, to establish the amount of her demand against the estate, it cannot be invoked as creating a lien, which would give that demand a *priority* of payment.

The second proposition asserted by the counsel for the appellee assumes that, "by the provisions of the statute, entitled 'an act for the relief of landlords,' a *special lien* upon the crops is given, which takes the claim for rent out of the operation of the act providing for the distribution of inventory estates." We have examined this statute with great care, and are unable to discover, in either its phraseology or spirit, any design or intention on the part of the legislature to give any lien on the crops or other property for the rent agreed to be paid. In the enactment of the statute it was manifestly the intention of the legislature only to enlarge and extend the "remedy," and not to any pre-existing "right," further than to require that this enlarged remedy should be invoked, the right s

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evidenced by a "written contract, signed and sealed by the contracting parties, in the presence of two subscribing witnesses."

By reference to the law as it stood at the date of the enactment of the statute, it will be seen that the remedy by "distress" was limited to the amount of fifty dollars, and for the recovery of any larger amount the party was put to his action for "use and occupation." This statute only extended the remedy by "distress" to any amount that might have been agreed upon by the parties, provided the same were evidenced as before stated; and the only reference to the matter of "lien" occurs in the second section, where it is declared that "such writ shall be a lien on all crops made or grown on such land, for, and during the year for which such rent may be due, or to become due." Thus it will be seen that the *lien* given by this statute arises from the issuing of the "writ of distress," and as this writ was not issued until *after* the death of the intestate, it is clear that it does not come within the ruling in the case of Kimball vs. Jenkins, before referred to.

We have examined this case with great care, and after the most mature deliberation, are constrained to decide that upon the facts of the case as they have been made known to us by the record, the demand of the appellee is not entitled to any preference over that of the other creditors of the estate. It is therefore ordered and adjudged, that the judgment of the Circuit Judge be reversed and set aside, and that the appellee be remitted to the Court of Probate, there to have her claim settled *pro rata* with the demands of the other creditors of the estate.

REPORTS
OF
CASES ARGUED AND ADJUDGED
IN THE
Supreme Court of Florida,
AT
TERMS HELD IN 1867-'8-'9.

BY JOHN B. GALBRAITH and A. R. MEEK, Reporters.

VOLUME XII.—PART TWO

TALLAHASSEE.
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1869.

JUDGES OF THE SUPREME COURT.

DURING THE PERIOD OF THESE REPORTS.

TERMS 1867-'8.

HON. CHARLES H. DUPONT, CHIEF-JUSTICE.

HON. SAMUEL J. DOUGLAS, } **ASSOCIATE-JUSTICES.**
HON. JAMES M. BAKER, }

JOHN GALBRAITH, ATTORNEY-GENERAL.

TERMS IN OCTOBER, 1868, AND IN 1869.

HON. E. M. RANDALL, CHIEF-JUSTICE.

HON. O. B. HART, } **ASSOCIATE-JUSTICES.**
HON. J. D. WESTCOTT, JR., }

A. R. MEEK, ATTORNEY-GENERAL.

JUDGES OF THE CIRCUIT COURTS.

DURING THE PERIOD OF THESE REPORTS.

TERMS 1867-'8.

HON. ALEX. McDONALD, JUDGE MIDDLE CIRCUIT.

HON. B. F. PUTNAM, JUDGE EASTERN CIRCUIT.

HON. THOS. T. LONG, JUDGE SUWANNEE CIRCUIT.

HON. G. A. STANLEY, JUDGE WESTERN CIRCUIT.

Judgeship of Southern Circuit vacant because of the death of HON. JAMES GETTIS.

TERMS 1868-'9.

HON. HOMER G. PLANTZ, JUDGE FIRST JUDICIAL DISTRICT.

HON. P. W. WHITE, JUDGE SECOND JUDICIAL DISTRICT.

HON. THOS. T. LONG, JUDGE THIRD JUDICIAL DISTRICT.

HON. ALVA A. KNIGHT, JUDGE FOURTH JUDICIAL DISTRICT.

HON. JESSE H. GOSS, JUDGE FIFTH JUDICIAL DISTRICT.

HON. JAS. T. MAGBEE, JUDGE SIXTH JUDICIAL DISTRICT.

HON. JOHN W. PRICE, JUDGE SEVENTH JUDICIAL DISTRICT.

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NOTE.—The Head Notes in each case were prepared by the Judge who delivered the opinion, as required by law.

Decisions
OF THE
Supreme Court of Florida,
AT TERMS HELD IN 1868-'9.

FRANKLIN DIBBLE, APPELLANT, VS. JOSEPH TRULUCK AND
JAMES J. HOLLAND, SHERIFF, &C., APPELLEES.

1. Courts of Equity will grant relief from judgments of Courts of law in a variety of cases, as where the defense could not at the time or under the circumstances be made available at law, without laches of the party; and in cases of surprise where reasonable diligence could not avail, and where the facts constituting the surprise are tantamount to a fraud.

2. But where a party has a clear, adequate, and easy remedy at law of which he neglected to avail himself by reason of a misapprehension of well-established rules of practice; or by reason of *anticipating* obstacles which might be met with in his progress, he stops short of pursuing his remedy, he is guilty of laches which estop him from pursuing his remedy in Equity.

3. As, where a party may have the benefit of a bill of exceptions, but neglects to avail himself of it, a Court of Equity will not step in to perform the legitimate office of such bill of exceptions.

Appeal from the order of Hon. A. A. Knight, Circuit Judge Fourth District.

The case is stated in the opinion of the Court.

H. Bisbee, Jr., for Appellant.

J. M. Baker and *A. R. Meek* for Appellee.

By the Court.

RANDALL, C. J. This is a suit by Bill in Equity to obtain an injunction restraining Joseph Truluck from enforcing a judgment and execution in his favor against the appellant, and to

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restrain and prohibit Holland, Sheriff of Duval county, from enforcing such execution, and for general relief.

The bill was filed in the Circuit Court for Duval county on the 5th day of September, 1868, and alleges that on or about the 10th day of October, 1866, Joseph Truluck obtained a judgment, upon the verdict of a jury, against the complainant, for three hundred dollars, in an action of replevin to recover the possession of a mule; that at the trial, the complainant (defendant in this suit) proved that he was the legal owner of the mule, having purchased the same of the United States government, the government having acquired a title thereto by capture during the war as prize or booty, and that no attempt was made to show that it had been recaptured.

It is further alleged that the party Truluck was the person from whom the mule was captured, while he was domiciled in the "Confederate States," and adhered to the Confederate government, and that he based his right of recovery in the replevin suit upon his ownership before the capture.

That upon the trial the Judge instructed the jury that if they found from the evidence that the mule in question was prize or booty of war, then the defendant was entitled to a verdict in his favor; but that if the jury found from the evidence that the mule in question was the property of the plaintiff at the time the suit was commenced, then the plaintiff was entitled to a verdict in his favor.

That the jury disregarded the evidence in the cause, and the charge of the Judge, and rendered a verdict in favor of the plaintiff Truluck, and against the defendant Dibble, for three hundred dollars.

That during the same term the defendant applied for a new trial, on the grounds that "the verdict was contrary to the evidence, and was excessive, unreasonable, and exorbitant."

"That the Judge overruled the motion, on the ground that he had not taken down the evidence, and did not know what it *was*, and that it was not his duty to know the evidence, and

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that he could not take any notice of the evidence, or assume to say what the evidence was, unless the counsel of the respective parties to the said action could agree upon the same." That the counsel could not agree upon the evidence, and that in consequence of the said Judge's omission and neglect of his duty to take down the evidence, or to pay such attention to it as would enable him to know what it was, complainant was deprived of a new trial, and was precluded from submitting to the Supreme Court, by appeal, the legal questions whether or not the verdict was contrary to the evidence in the case; that he did not and could not by himself, or through counsel, make up a Bill of Exceptions including the evidence, and procure the same to be signed by three bystanders, as provided by statute, because bystanders could not be procured for that purpose.

That an appeal was taken to the Supreme Court "upon the question of the duty of the Judge to know the evidence," and the Supreme Court distinctly and pointedly decided that it was the duty of the Judge of the Circuit Court to know what the evidence was, by taking minutes or paying attention to it, so that he could correctly charge the jury and correctly decide upon a motion for a new trial; and because the evidence was not before them in consequence of the omission of the Judge, the Court could not pass upon the correctness of the verdict.

That the complainant had a clear legal and conscientious title to the property, and that without any fault, negligence, or want of care and diligence on his part, he has been deprived of his rights and his legal title; "and that by the failure, omission, and disregard of the said Judge to do his duty as decided by the Supreme Court, he is in danger of being grossly wronged and injured, and has been deprived of his right to have the legal title to his property judicially determined and decided;" and "that from the neglect and omission or failure of the said Judge to perform his duty, a fraud has been perpetrated upon his rights;" and that the defendant Holland, Sheriff of Duval county, has levied upon his property to satisfy an execution

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issued upon such judgment; wherefore the complainant prays an injunction, as before stated.

Upon the filing of this Bill the complainant moved for a preliminary writ of injunction, and the Judge of the Circuit denied the motion; and from the order denying a preliminary injunction the complainant appeals.

It is unnecessary to consider whether the complainant had a valid defense in the replevin suit, or how clear his case may have been, unless we find that he is driven into the Court of Chancery by some legal necessity; but assuming that he had such defense, we must next ascertain whether by his Bill he is entitled to this resort.

“Courts of Equity will grant relief against judgments at law when the defense could not at the time or under the circumstances be made available at law without any laches of the party;” and also, “when a party is taken by surprise, and could not by reasonable diligence have protected himself from the consequences of such surprise; or when the *facts* constituting such surprise are tantamount to a fraud, Equity will grant relief.”

Equity will relieve in many cases against a judgment which is clearly against conscience; and against the consequences of fraud and circumvention; and where the party has been misled by the opposing party or his privies; and in diverse other circumstances, as urged by the complainant’s counsel, and sustained by authorities cited by him.

But we must first ascertain whether the party praying such relief has either exhausted his remedy, or been deprived of it in the court of law by fraud, or by impediments thrown in his way by other parties, and without laches of his own. When this case was before this Court on a former occasion, the Judge who delivered the opinion pointed out very clearly (XI. Fla. R., 137, 138, 139) the practice proper to be observed in order to obtain a proper review of the case upon its merits. (See also Thompson’s Dig., 351, and Laws of 1852-3, p. 100.) The party desir-

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ing to review a judgment after verdict, is authorized and required to make his motion for a new trial in writing, stating the reasons therefor, and obtain the decision of the Judge thereon. So far this requirement was pursued, and the Judge refused to grant a new trial upon the grounds stated in the motion. The party was then authorized and required to prepare his case and exceptions, and on notice to the other party, ask the Judge to sign the same. If the Judge then refuses to sign or take notice of the case, three bystanders may be called upon to sign the same, and attest the fact of such presentation and refusal, and then the bill is complete, and may be filed and become a part of the record.

It appears by this bill that the complainant stopped short upon the refusal to grant a new trial, and *made no attempt* to prepare and present his bill of exceptions, but appealed from the *opinion* of the Judge "that it was not his duty to keep minutes, or to know what the evidence was," which he had just listened to. The Judge was under no obligation to furnish counsel with minutes of testimony, but he did know what proceedings had been had in his presence, otherwise he did not act intelligently. His real or pretended ignorance of the facts, however, did not prevent the party from preparing and perfecting his bill of exceptions, and tendering it to the Judge for signature.

No fraud was perpetrated, he was not hindered or prevented from exercising due diligence, was not misled, nor was the conduct of the Judge such as to cause a *legal* "surprise," whatever other emotion may have been excited by it.

The omission, therefore, of the complainant to pursue his remedy at law, which was complete, is not excused by anything that transpired, and this omission alone prevented his accomplishing by an appeal in that case precisely what he seeks in the prosecution of this bill.

We are therefore of opinion that the order appealed from should stand.

The State of Florida vs. William H. Gleason.

THE STATE OF FLORIDA, UPON THE RELATION OF THE ATTORNEY-GENERAL OF SAID STATE, WHO PROSECUTES IN THE NAME AND BY THE AUTHORITY OF SAID STATE, VS. WILLIAM H. GLEASON, LIEUTENANT-GOVERNOR OF SAID STATE.

1. The fifth section of the 6th article of the Constitution of this State provides that "the Supreme Court shall have appellate jurisdiction in all cases in equity, also in all cases of law in which is involved the title to, or right of possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand or the value of the property in controversy exceeds three hundred dollars; also in all other cases not included in the general subdivisions of law and equity; also in all questions of law alone; in all criminal cases in which the offense charged amounts to felony. The court shall have power to issue writs of *mandamus*, *certiorari*, prohibition, *quo warranto*, *habeas corpus*; and also all writs necessary or proper to the complete exercise of its appellate jurisdiction." Held, that the jurisdiction of this court is two-fold—appellate jurisdiction proper, with power to issue all writs necessary to its full exercise, and original jurisdiction to issue the writs specified where they are the appropriate remedies.

2. A grant of power to issue a writ of *quo warranto* embraces and includes the proceeding by information in the nature of a *quo warranto*, this proceeding being civil in its essential incidents, and having in view the same object.

3. A constitutional grant of power to issue a writ of *quo warranto*, can be exercised by this court without legislative action prescribing the mode and manner of its exercise, and the court will discharge its duty by a course conformable to the principles of the common law, in the absence of legislation upon the subject.

4. A plea to an information, in the nature of a *quo warranto*, should set out the defendant's title at length; it should be responsive to the information. The defendant must justify or disclaim, and not guilty, or *non usurpavit*, are not good pleas. All the facts necessary to constitute a good title must be set up. In default of such a plea judgment by default goes for the State.

5. The Attorney General is the proper officer to file an information, in the nature of a *quo warranto*, against a person holding a public office, to inquire into his title to the same. It is a power incident to his office. Upon the filing of the information the writ issues upon his demand, as in

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ordinary actions of debt by the State against its debtors, and in a case of this character the court cannot inquire into his motives, or the motives of a third person alleged to influence his action.

6. The Legislature of this State has no authority to hear and determine a case involving the right and title to the office of Lieutenant-Governor of this State. This is a power distinct from the right of the Senate to try an officer for crime upon articles of impeachment preferred by the Assembly. It is judicial in its character, and a matter solely within judicial cognizance. Nor is it a political question beyond the power of the courts to determine.

7. The right to an office will not be inquired into collaterally; the only method known to the law of trying the legal title to an office is by a direct proceeding for that purpose.

8. An officer *de facto* is one exercising the duties of an officer under color of election or appointment, and his acts are as valid and binding upon the public, or upon third persons, as those of an officer *de jure*.

9. In a State where equal rights are guaranteed to all by fundamental law, the act of Congress entitled "An Act to protect all persons in their civil rights and furnish the means of their vindication," is inoperative to permit a party, after a full and fair hearing, to question the correctness of judicial decisions affecting his rights, and by his own act transferring the cause; such a doctrine would destroy all power of State courts, and it is the duty of the State court to set aside the petition, and proceed to hear and determine the case according to the principles of law.

10. A prosecution instituted in the name and in behalf of the people of the State of Florida, is a substantial compliance with the constitutional requirement in section 2, article VI., viz.: "The style of all process shall be 'The State of Florida,' and all prosecutions shall be conducted in the name and by the authority of the same." It is sufficient, if it appear from the record that it is conducted by the authority of the State of Florida as distinct from the authority of any other power.

11. The proceeding by information, in the nature of a *quo warranto*, is essentially a civil proceeding, and the pleadings in it are as much subject to amendment as they are in ordinary civil actions. It is criminal only in form.

12. The Constitution, until changed in some recognized legal mode, is as well a limit upon the power of the people as upon the departments of the government. The simple election by the people of a person to an office who has not the constitutional requisites for eligibility does not destroy the effect of the constitutional requirements. The fact that the party

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is eligible at the time the *case is tried* cannot modify the principle. He must have been so when elected. Nor is it necessary that there shall be a party contesting the office before this court can act. It acts upon the motion of the Attorney-General.

13. The terms "registered voter," in section 22, article XVI., of the Constitution of the State, refer to the registration authorized by the 6th section, article XIV., of the Constitution. It did not become operative as a requirement for eligibility to office before the Legislature had passed a registration law, and the constitutional requirement could not be complied with.

14. The office of Lieutenant-Governor of this State being an office created by the Convention which framed the Constitution of this State, it is not controlled in such manner by the legislation of Congress authorizing the holding of such Convention, as makes the constitutional requisites for eligibility inoperative. Officers elected at the first election to fill the offices provided by the Constitution must be eligible according to its requirements.

A. R. Meek, Attorney-General, *J. P. Sanderson*, *M. D. Papy*, and *A. J. Peeler*, for the State.

D. S. Walker and *Horatio Bisbee, Jr.*, for Respondent.

Almon R. Meek, Attorney-General of the State of Florida, on the 19th day of November, A. D. 1868, during a term of the Supreme Court of said State, appeared and made his certain motion in said court, in the words and figures following, to wit:

EX PARTE STATE OF FLORIDA, EX REL. ALMON R. MEEK, ATTORNEY-GENERAL OF THE STATE OF FLORIDA.

And now the said Attorney-General moves the court for leave to file an information in the nature of a *quo warranto* against William H. Gleason, exercising the functions, &c., of Lieutenant-Governor of the said State, and for due process according to the prayer of said information.

ALMON R. MEEK, Attorney-General.

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Leave being granted, he thereupon filed an information, in the nature of a *quo warranto*, against William H. Gleason, in the words and figures following, to wit:

IN THE SUPREME COURT OF THE STATE OF FLORIDA.

Almon R. Meek, Attorney-General of the people of the State of Florida, who sues for the said people in this behalf, comes here before the Justices of the people of the State of Florida of the Supreme Court of the same people, on the nineteenth day of November, A. D. 1868, at an extra and special term thereof, and for the said people gives the said court here to understand and be informed that William H. Gleason, to wit in said State, for the space of five months, now last past, and upwards, has used, enjoyed, exercised, and performed, and still does use, enjoy, exercise, and perform without warrant or authority, in violation of the existing Constitution of said State, the franchise, functions, and powers of the office of Lieutenant-Governor of the people of the State of Florida aforesaid, and has actually presided over the deliberations of the Senate of said State, and also done otherwise which are authorized and required to be done and performed by the Lieutenant-Governor of the people of said State, and which he alone has a right to do, which said office and the franchises and functions and powers thereof, the said William H. Gleason, during all the time aforesaid, usurped, and still does usurp upon the people aforesaid, to their great damage and prejudice.

And the said Attorney-General of the said people, who prosecutes as aforesaid, further gives the court to understand and be informed that the said William H. Gleason for the space of five months, now last past, and upwards, has used, and still does use and exercise and enjoy the office and franchise of Lieutenant-Governor of the people of the State of Florida, in violation of the existing Constitution of said State, for that by the fourteenth section of the fifth article of said Constitution it is ordained and required that the Lieutenant-Governor shall be elected at the

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same time and place, and in the same manner, as the Governor, and that his term of office and eligibility shall also be the same as the Governor, and by the third section of said fifth article of said Constitution it is ordained and required, that no person shall be eligible to the office of Governor who is not a qualified elector, and who has not been nine years a citizen of the United States, and three years a citizen of the State of Florida, next preceeding the time of his election; and for that, by said sections and provisions of said Constitution, no person is eligible to the office of Lieutenant-Governor who has not been nine years a citizen of the United States, and three years a citizen of the State of Florida, next preceding the time of his election; and for that, heretofore, to wit, the said William H. Gleason, on the first Monday, Tuesday, and Wednesday of May, in the year of our Lord one thousand eight hundred and sixty-eight, was elected to the office of Lieutenant-Governor of the people aforesaid; and afterwards, to wit, on the seventh day of July, in the same year, to wit, at Tallahassee, in said State, then and there did take the oath prescribed by the Constitution of said State to be taken by each officer in said State, as a Lieutenant-Governor thereof; he, the said William H. Gleason, then and there being ineligible, under the said provisions of the said Constitution of said State, to the said office of Lieutenant-Governor, for that the said William H. Gleason had not then and there been a citizen of the State of Florida for the full period of three years then next preceding said election, so, as aforesaid, held on the said several days in May aforesaid, as in and by the provisions of said Constitution required; and so the Attorney-General aforesaid does give the court here to understand and be informed that the said William H. Gleason, during all the time aforesaid, has usurped, and still does usurp, upon the people aforesaid, the said franchise, functions, and powers of the said office of Lieutenant-Governor of the people aforesaid, to their great damage and prejudice.

Whereupon the said Attorney-General prays the advice of this court in the premises, and due process of law against the

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said William H. Gleason in this behalf to be made, to answer to the said people by what warrant or authority he claims to use, enjoy, exercise, and perform the franchise, functions, and powers aforesaid.

ALMON R. MEEK,

Attorney-General of the State of Florida.

Whereupon an order in the premises was made by the court, in the words and figures following, to wit:

IN THE SUPREME COURT STATE OF FLORIDA.

IN THE MATTER OF INFORMATION BY THE ATTORNEY-GENERAL,
VS. WILLIAM H. GLEASON.

The Attorney-General having moved the court for leave to file an information, in the nature of a *quo warranto*, against William H. Gleason, Lieutenant-Governor of the State of Florida, it is ordered that leave be, and is hereby, granted to said Attorney-General to file said information, and on further motion in this behalf it is also ordered that a rule be, and is hereby, granted against the said William H. Gleason requiring him to show cause before this court on Tuesday morning next, at ten o'clock, A. M., why the said writ of *quo warranto* prayed for in said information should not issue, and that a copy of this order and of the information aforesaid, duly certified by the clerk, be served on said William H. Gleason, and that the service of said copy of said order and of said information on said William H. Gleason, shall be sufficient service of the rule aforesaid.

Upon which said original order is endorsed the following, to wit:

Executed by serving a certified copy of this order and of the information upon William H. Gleason, this 19th day of November, A. D. 1868.

C. J. PORTER,

Deputy Sheriff Supreme Court Florida.

And afterwards, to wit, on the twenty-fourth day of November, in the year of our Lord one thousand eight hundred and

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sixty-eight, came William H. Gleason by his attorneys, H. Bissbee and David S. Walker, and upon motion of respondent's attorney's the rule aforesaid was enlarged and further time given to answer the same until eleven o'clock, A. M. the twenty-fifth day of November, in the year of our Lord one thousand eight hundred and sixty-eight, at which time, upon further motion of respondent's attorneys, the rule was enlarged and further time given to answer the rule aforesaid until four o'clock, P. M., of the same day, at which time the rule was again enlarged, upon motion of respondent's attorney, until the following day, the twenty-sixth of November, at ten o'clock, A. M., at which time the respondent, by his attorneys, filed his answer in the words and figures following, to wit:

SUPREME COURT, STATE OF FLORIDA.

In answer to the writ issued out of this court, commanding William H. Gleason to show cause why a writ of *quo warranto* should not be issued against him, the said William H. Gleason specially appears and says that he ought not to be made to show by what warrant or authority he claims and enjoys, exercises, and performs the franchise, functions, and powers of Lieutenant-Governor of the State of Florida, by reason of anything contained in the paper purporting to be an information on file in this case:

First. Because the said court has no power or jurisdiction to issue, or cause to be issued, a rule to show cause why a writ of *quo warranto* should not issue against the said William H. Gleason.

Second. Because the said court has no original jurisdiction to grant leave to file an information in the nature of a *quo warranto*.

Third. Because the said court has no original jurisdiction under the Constitution and laws of this State to issue a writ of *quo warranto*, or to try and determine proceedings thereon.

Fourth. Because the power given to said court, if given at

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all by the Constitution of this State, to issue writs of *quo warranto*, cannot be exercised save as auxiliary to the exercise of its appellate jurisdiction, until the Legislature shall have prescribed the mode and manner and cases in which it shall be exercised.

Fifth. Because the said Almon R. Meek, represented in the said rule of this court to show cause as being the Attorney-General of the State of Florida, is not the Attorney-General of said State, nor are the said proceedings instituted or prosecuted by the Attorney-General of said State; and because the said Almon R. Meek, claiming to exercise the functions and authority of Attorney-General, was appointed by Harrison Reed, Governor of the said State, after he had been impeached by the Assembly of said State, and before his acquittal by the Senate, and was therefore, by the Constitution of said State, under arrest, and disqualified from performing any of the duties of his office.

Sixth. Because at the time of the institution of the proceedings in this case, and at present, F. A. Dockray was, and is, the legal Attorney-General of the State of Florida, he having been appointed to that office by the Lieutenant and acting Governor of the State, William H. Gleason, after the impeachment of the said Harrison Reed, and before his acquittal by the Senate, upon whom, and at that time and before, had devolved by the Constitution of the State all the powers and duties of government.

Seventh. Because the motion for leave to file the said paper, purporting to be an information, is not founded upon any affidavit.

Eighth. Because if the said court has jurisdiction over informations in the nature of a *quo warranto*, or over writs of *quo warranto*, it ought not, in the exercise of its absolute discretion with which it is vested, to grant the writ in this case, for the reason of public policy and the public interest do not demand or require the issuing of the said writ, but on the contrary require that it shall be denied.

Ninth. Because Harrison Reed, since his impeachment as

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aforesaid, has caused the said motion to be made and the proceedings to be instituted from malicious and vindictive motives, and to gratify a spirit of revenge and recrimination against the said Gleason.

Tenth. Because Harrison Reed, at the time when the said William H. Gleason was elected, knew by information or otherwise how long the said Gleason had been a citizen of this State, and because the said Harrison Reed, at the time the said Gleason was nominated for his said office, knew of his own knowledge or otherwise how long the said Gleason had been a citizen of this State, and because with the said knowledge the said Harrison Reed urged and solicited the nomination of the said Gleason to the office of Lieutenant-Governor, and advocated his election during his election canvass, and voted for his election himself, and his full knowledge of all the facts he has caused to be set forth in the said paper, purporting to be an information, as the ground for asking the said court to issue the said writ.

Eleventh. Because the said proceeding is recriminatory against the said William H. Gleason, and grew out of the late impeachment of Harrison Reed by the Assembly of the State of Florida, the said Harrison Reed charging the said Gleason with having caused and influenced his impeachment as aforesaid.

Twelfth. Because the Constitution has given the power to the Assembly to impeach the Lieutenant-Governor, and the Senate to try and remove from office, and that the said bodies will soon be in session and exercise the power if deemed necessary.

Thirteenth. Because it would be an improper use of the powers of this court, if it had such power, to grant the said writ for the purposes and motives that have originated this proceeding, and appearing herein.

And for reasons above set forth, and divers other reasons, the said William H. Gleason moves that the said rule to show cause why a writ of *quo warranto* should not issue against him as Lieutenant-Governor be discharged, and the proceedings instituted in this case be quashed.

W. H. GLEASON.

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Subscribed and sworn to before me this 24th day of November,
A . D. 1868. S. CONANT, Justice of the Peace.

The first four answers upon which the motion to discharge the rule is based, raising the question of jurisdiction, were first considered, to determine whether the court would proceed with the cause.

After argument of counsel,

WESTCOTT, J., delivered the opinion of the Court.

This is an application for this court to exercise original jurisdiction in the case at bar, which is an information in the nature of a *quo warranto* instituted in behalf of the State of Florida by Almon R. Meek, its Attorney-General.

Under the first four points of the answers to the rule, the following questions arise :

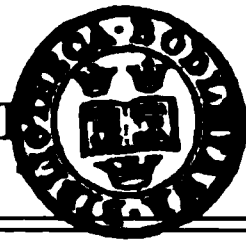
Has this court original jurisdiction to issue a writ of *quo warranto*? If so, do proceedings under an information in the nature of a *quo warranto* come within the constitutional grant of power to issue a writ of *quo warranto*, and is it necessary for the Legislature to prescribe the mode and manner of proceeding before the court can exercise the power granted in the Constitution?

Upon an examination of the Constitution of the several States (as well as that of the United States) it will be found, that in some constitutions the powers granted to the Supreme Court are threefold:

First. Appellate powers.

Second. Original powers, embracing the power to issue writs of mandamus, *quo warranto*, prohibition, and *habeas corpus*, addressed to persons, or to courts.

Third. The grant of power to exercise a superintending control over courts of inferior jurisdiction, by means of writs of *certiorari*, prohibition, mandamus, and other writs applicable to this purpose.



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In other States, it will be found that the powers given are two-fold:

First Appellate powers strictly.

Second. Power to exercise a superintending control over inferior jurisdictions by appropriate writs, and power to issue writs of *habeas corpus*.

A careful examination will show that the Supreme Courts of the States are, as a general thing, clothed with powers in addition to those which are *appellate in their character*.

Thus; in New Hampshire, the Supreme Court, like the Court of King's Bench, its great prototype, has *exclusive* jurisdiction to issue writs of *quo warranto*, mandamus and prohibition; a jurisdiction of this character being not only "very high and transcendent," but in its results, important, keeping all inferior jurisdictions within their limits, superintending all corporations, commanding magistrates to do their duty, and protecting the offices of the State, and its franchises, from usurpation. They are high prerogative writs.

The Supreme Courts of Massachusetts, Minnesota, Connecticut, Arkansas, Missouri, Maine, California, Michigan, New Hampshire, and of other States, not necessary to mention, have original powers; so has the Supreme Court of the United States. It is true that the original power exists to a very limited extent in many, but it is there nevertheless.

The powers granted to the Supreme Court of this State are found in Sec. 5, Art. VI., of the Constitution, which is as follows: "The Supreme Court shall have appellate jurisdiction in all cases in equity, also in all cases of law in which is involved the title to or right of possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand or value of the property in controversy exceeds three hundred dollars; also in all other civil cases not included in the general subdivisions of law and equity; also in all questions of law alone, in all criminal cases in which the offense charged amounts to felony. The court shall have power to is-

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sue writs of mandamus, *certiorari*, prohibition, *quo warranto*, *habeas corpus*, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have the power to issue writs of *habeas corpus* to any part of the State upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court, or before any Circuit Court in the State, or before any judge of said courts."

It will be noted that the second clause is as follows:

"The court shall have power to issue writs of mandamus, *certiorari*, prohibition, *quo warranto*, *habeas corpus*, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction."

The question here is, Does this clause grant the power to this court to issue the enumerated writs, otherwise than in aid of its appellate jurisdiction and as an original power?

Two positions are taken in argument in reference to the grant of powers to the Supreme Court.

It is assumed, that that portion of the Constitution preceding the clause which we are here to construe, vests a jurisdiction which is strictly appellate in its character, and, excluding the exceptions enumerated, so extensive in its scope that the "human mind can conceive of no case in which the court has not appellate jurisdiction."

This is without doubt a correct construction, and it follows from it also, that the court would, without any additional or subsequent clause in the Constitution, possess all the powers necessary to its complete exercise, upon the admitted and ever active principle applicable to the construction of constitutional grants of power—that the incidental power follows the grant of the principal power. A grant of the principal power of appellate jurisdiction embraces, *ex necessitate*, the powers appropriately adjunct thereto; without them the principal grant would be inoperative, and substance become but shadow.

The second position assumed in argument is, that the next

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grant of power contained in the words "the court shall have power to issue writs of mandamus, *certiorari*, prohibition, *quo warranto*, *habeas corpus*," is qualified by the words "necessary or proper to the complete exercise of its appellate jurisdiction," in the subsequent portion of the sentence.

The precise extent to which it was qualified was not developed, but looking to authority to determine it, the conclusion is irresistible, that with this construction this court has nothing granted in this entire sentence, purporting to grant additional powers, which did not follow from the extensive grant contained in the preceding portion of the section.

If the words "necessary or proper to the exercise of its appellate jurisdiction" are held to qualify to the extent claimed the power to issue the preceding enumerated writs, the result is twofold:

First. That this court has nothing except appellate jurisdiction, and it can issue no writs, whatever may be their character (except *habeas corpus*), that are not necessary or proper to a complete exercise of appellate jurisdiction.

Second. That power "to issue writs of mandamus, *quo warranto*, *habeas corpus*, and such other remedial and original writs as are necessary to give this court a general superintendence and control of all inferior courts," is not vested in this court.

As to the second position stated, it is taken upon the assumption that Justice Thompson, one of the ablest judicial minds this State has produced, was correct in his view in the case of *ex parte White*, 4th Florida, 165, to the effect "that power to issue writs of injunction, mandamus, *quo warranto*, *habeas corpus*, and such other remedial and original writs as may be necessary to give this court a general superintendence of all other courts, is a power not necessarily included in the grant of appellate jurisdiction."

This conclusion of Justice Thompson is somewhat shaken, if not entirely overthrown, by the decisions in the Supreme Court of the United States.

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The powers granted to the Supreme Court of the United States by the Constitution of the United States are original as to cases affecting ambassadors, &c., but in all other cases the Supreme Court *has appellate jurisdiction*.

Under this grant, and by virtue of acts of Congress regulating it, which as a matter of course could only be operative within the Constitution, the Supreme Court of the United States in *U. S. vs. Richard*, Peters District Judge, granted a writ of prohibition to restrain an inferior court. 3 Dall. 121.

In *ex parte* Bradstreet, 7 Peters, 648, a writ of mandamus to the Judge of the District Court of the United States, Northern District of New York, was granted.

A *habeas corpus* and *certiorari* was granted in *ex parte* Burford, 3 C., 448.

While we concur with Justice Thompson in the conclusion to which he arrived in *ex parte* White, we do not agree with him as to this doctrine, one of the premises upon which his conclusion was based.

The conclusion from these cases in the Supreme Court of the United States is, that when the object and effect of an application to the Supreme Court of the United States is to bring under review the decisions of an inferior court, or to direct its action, or control or annul its excesses, the appellate jurisdiction given by the Constitution attaches, and that the court may exercise that appellate jurisdiction, in some cases by means of the writ of *habeas corpus*, and in others by the writs of mandamus, *certiorari* and prohibition.

It makes no difference, however, which is the correct rule, for looking at our Constitution in the light of the doctrine enunciated in *ex parte* White, or in the contrary view held as to the extent of powers resulting from a simple grant of appellate jurisdiction by the Supreme Court of the United States, there is one result which attends both.

If the doctrine in *ex parte* White—that the power to issue these writs to control inferior courts does not attach to a gen-

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eral appellate jurisdiction—be correct, then the subsequent clause, which restricts the power to issue them to these purposes according to the construction contended for, operates to qualify the previous clause to such an extent as to destroy it, and to render the principal and leading portion of the sentence, the one that in very words purports to grant a power, entirely nugatory, by a clause subsequently qualifying it. So also, if the powers incident to the simple grant of appellate jurisdiction are correctly stated by the Supreme Court of the United States, it is evident that the entire clause was unnecessary, for it conferred nothing which it did not have before.

In either view, it will thus be seen that these conclusions are inconsistent with the rule that when several grants of power are made in an instrument, they should be so construed as to make them each operative to accomplish the usual purposes to which they are applicable.

There is again a manifest difference between the *effect* which the clause construed by Justice Thompson had by his construction, and that which would follow the construction of this entire clause as contended for by respondent here.

Whatever may be said of the construction which Justice Thompson gave to the clause in the old Constitution in other respects, it yet made it operative to confer an *additional power*. According to his view it vested a jurisdiction not granted in the preceding clauses. He did not make it surplusage, or unnecessary. If, admitting the operation of the last clause of this sentence to be as contended for by respondent, it resulted to vest another and different power, then the effect given to the entire and parallel clause of the old Constitution would be carried out; but when this is not so, but a construction is given which vests no additional power, we depart from the path he followed. We should recollect in giving a construction to constitutional grants that it is not their aim to provide the mode and method by which powers are to be exercised.

Any construction of a sentence, even in an instrument of much

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less importance than a Constitution, which makes one portion of it so qualify another that it destroys its effect, or makes it surplusage when used in connection with the other portion of the instrument, or such a construction of a clause in a State Constitution purporting to give power as permits it to give no other than existed before, is not usually correct. Such a construction should not be given unless the language is capable of no other intelligent meaning.

Permitting this rule to operate here, we are satisfied that no impartial mind can give to this entire sentence, proposing to grant a distinct power, such an interpretation as does not do so. If such is the case, the power to issue the specified writs must be original. Such a construction is entirely consonant with the general purposes of the creation of a Supreme Court; that is, that it should have some other power than that which is strictly appellate. This is true of the Supreme Court of the United States, and it is true in reference to the Supreme Judicial Tribunals of most of the States.

In the old Constitution this could not operate, because the court by its terms was expressly restricted to *appellate jurisdiction only*, except in those cases otherwise provided. Here we have no alagous clause. If there was, we would require a most positive grant of original power before we should admit it. General terms such as this, preceding the body of the grant, should have a general effect to control and limit the subsequent portions of it; and this would be the case even though some portions of it are rendered inoperative, unless the intention to modify the original limitation is clearly expressed. This we conceive is the only justification for such a construction being given to the old Constitution as restricted its power to issue a writ of *quo warranto* to a case where it must be used to control or supervise a subordinate court, a case which any one at all familiar with the nature of the proceeding, and the end it accomplishes, knows can never arise.

This proceeding cannot control or supervise. To control,

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means to direct without destroying; to supervise, to some extent involves the same idea. A writ of *quo warranto* affirms an existing right to an office, or it destroys and sets aside the pretended claim of an usurper; it controls him in the exercise of the office in no legitimate sense, and it does not supervise its exercise, but destroys the power to act, by denying the right to hold the office and pronouncing judgment of ouster.

If the same power and none other was intended to be granted in the new Constitution, why was there so marked a difference between the language employed in the two? The framers of the new Constitution had but to adopt the language of the first, which had received judicial construction, to secure the same result; that they adopted different language shows that they intended to make a change in the power.

These specified writs are the very "armor of sovereignty; they are designed for the very purpose of protecting the sovereignty from invasion or intrusion;" the office of one, the "writ of *quo warranto*," is to check the course of usurpers, and to remove those from positions "who assume without legal right its name, or seize upon its franchise." The purposes for which the specified writs in this clause are applicable, should to some extent control us in our interpretation of it.

A mandamus is a writ addressed as well to corporations and officers as to courts. The writ of *quo warranto* is addressed to officers either of the State or of a corporation. In so far as the mandamus controls courts it can be used as auxiliary to appellate jurisdiction; in other cases it is not so. *Marbury vs. Madison*, 1st Cr., 165.

If there was a doubt, the rules of construction would require full operation to be given to these writs to accomplish the natural ends to which they are adapted.

Much stress has been laid upon the use of the conjunction "and" in this sentence, preceded as it is by a comma.

To say that because a copulative conjunction and a comma intervene between two clauses of a complete sentence vesting

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powers in a court, that what follows necessarily restricts the application of what precedes, as an abstract proposition is no more a necessary result than the reverse of the proposition, to wit: that what precedes necessarily restricts what follows. The true rule is, that the concluding clause or preceding clause may restrict, limit, or enlarge as the language requires, and as the nature of the subject matter demands. When "we interpret a Constitution, what we are to seek is, the thought which it expresses. To do this, the first resort in all cases is to the natural signification of the words employed, in the order of arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning apparent in the face of the instrument is the one which we alone are at liberty to say was intended to be conveyed."

It is contended that this court can use these writs only in aid of its appellate jurisdiction. Is this the natural import of the words?

The sentence is, "the court shall have power to issue writs of mandamus, *certiorari*, prohibition, *quo warranto*, *habeas corpus*, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction." The word "*also*," here used, signifies "in like manner, further, likewise;" and its effect is not to limit, or to restrict, but to enlarge; the sentence is the same as if it was "the court shall have power to issue" the specified writs, and shall have power "to issue all writs," &c. Why use the words "and also," if something in addition to what had gone before was not to follow, and the words "all writs," if some of the same character preceded? And why restrict the grant of power to issue all writs to those necessary for its "*appellate* jurisdiction," if it had none other than appellate jurisdiction? Why, in a subsequent clause, point out the mode of exercising the previous grant to issue the writ of *habeas corpus*, and confer express original jurisdiction, if the tribunal was to be

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appellate only? It should be construed to grant a new power, as well as to give full effect to the specified writs. The whole clause should be construed in accordance with the manifest purpose of the grant of power to issue the writ of *habeas corpus*, which the subsequent portion providing the machinery for its exercise makes clear was to be an original power.

Our conclusion is, that the jurisdiction of this court is twofold: appellate jurisdiction proper, with power to issue all writs necessary to its full exercise, and original jurisdiction to issue the specified writs when they are the appropriate remedies.

Having disposed of this point, the next question to be considered is, Does the proceeding here, to wit: an information in the nature of a *quo warranto*, come within the constitutional grant of power to issue a writ of *quo warranto*?

It will be found by reference to the American cases, that the constitutional grant of power in other States where the proceeding has been by information, is precisely similar to the grant here.

An examination will show that in the American practice, the terms "*quo warranto*," and "information" in the nature of a *quo warranto*, are used as synonymous and convertible terms, the object and end of each being substantially the same. Speaking of an information of this character where the constitutional grant of power was the same as in our Constitution, the Supreme Court of Missouri say: "This court conceives that jurisdiction is given of this case by the power to issue writs of '*quo warranto*.'" State vs. Merry, 3d Mo., 198; 8th Mo., 331.

In Wisconsin, the Supreme Court hold to the same view, remarking that the information has in view the same object. 1st Wisconsin, 333.

This upon examination will be found to be the American doctrine, and in England such a thing as a distinct proceeding by the ancient writ of *quo warranto* has not been practiced for centuries.

Is it necessary for the legislature to prescribe the mode of

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proceeding, before the court can exercise the general power granted by the Constitution?—is the next point raised, which reaches to the jurisdiction of the court.

Chief-Justice Marshall, in speaking of implied and resulting powers from a general grant of jurisdiction, says: "It has been justly observed that no act of Congress directs grand juries or defines their powers. By what authority, then, are they summoned? The answer is, that the laws of the United States have erected courts which are invested with criminal, jurisdiction. This jurisdiction they are bound to exercise, and it can only be exercised through the instrumentality of grand juries. They are therefore given by a necessary and indispensable implication. But how far is this implication necessary and indispensable? The answer is obvious. Its necessity is co-extensive with that jurisdiction to which it is essential. Therefore the power is implied, and is as legitimate as if expressly given." 1st Brock, 159.

The precise point arose in 3d Mo., 198, where it was held, "the Legislature has not prescribed any mode of proceeding in a cause like the present, but in the absence of such regulations this court will proceed to discharge its duties by a course conformable to the common law usage."

Other citations on this point: 3d Dallas, 1. 2d Scam., 335. 2d Story on Con., 585, 1773. Sedg. Con. Law, 588.

Besides, the act of August 1st, 1868, vests the court with all necessary power. P. 10, Acts of 1868.

We think there is no necessity for the Legislature to act, to enable this court to exercise its constitutional jurisdiction. If such was the case, a refusal to act would emasculate the power of the court, and render it unable to perform its constitutional duties and powers.

The court having announced the foregoing opinion, the Attorney-General, on the 27th day of November, A. D. 1868, made and entered his certain motion in the words following, to wit:

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THE STATE OF FLORIDA, EX RELATIONE ALMON R. MEEK, ATTORNEY-GENERAL, vs. WILLIAM H. GLEASON.

Almon R. Meek, Attorney-General of the State of Florida, who, for the people of the State of Florida, prosecutes, in this behalf, comes here into the said Supreme Court, and moves the said court to strike out from the answer or return made to said rule, the causes or grounds therein shown, stated, and set forth, numbered respectively nine, ten, eleven, and thirteen, for irrelevancy and impertinence.

ALMON R. MEEK, Attorney-General.

After argument,

RANDALL, C. J., delivered the opinion of the court.

The respondent, by way of showing cause why a writ should not issue upon the information filed herein, urges reasons, numbered respectively from one to thirteen.

The Attorney-General moves to strike out, as irrelevant and impertinent, the causes numbered 9, 10, 11 and 13.

This motion has been very fully and faithfully argued, and incidentally, the merits of nearly all the points made by the respondent have been discussed.

The causes sought to be struck out by this motion, are substantially as follows:

9th. Because Harrison Reed, since his impeachment, has caused the proceedings to be instituted from malicious and vindictive motives, and to gratify a spirit of revenge and recrimination against said Gleason.

10th. Because Governor Reed, at the time when said Gleason was elected Lieutenant-Governor, knew, by information or otherwise, how long said Gleason had been a citizen of the State; had urged and solicited his nomination; advocated his election; voted for him; and had full knowledge of all the facts he has caused to be set forth in the information, as the ground for asking this writ.

11th. Because the proceeding is wholly recriminatory against

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respondent, and grew out of the late impeachment of Governor Reed—he charging said Gleason with having caused and influenced his impeachment.

13th. Because it would be an improper use of the powers of this court, if it had such power, to grant the said writ for the purposes and motives that have originated this proceeding, and appearing herein.

These causes are alleged as reasons why this proceeding should not be entertained by this court. What facts may be shown, to substantiate these charges against the Governor and Attorney-General, we do not know; they were not alluded to in the argument, and no proofs were filed or tendered in their support; the motion to strike out is based upon the irrelevancy of the points referred to, and the question really is, whether this court will stop to investigate the merits of alleged private differences between a party in this suit and a person who is not a party, and is not affected by the proceedings, whatever its result may be, that person being the highest officer of the State, the head of the Executive Department. This leads us to an examination of some of the peculiarities of a proceeding of this nature, the duties and responsibilities of the Attorney-General, and the relation of the Executive thereto.

Upon an examination of the information, we find no reference therein to the Executive, and no relator is named except the Attorney-General, who files the information as the Attorney of the State and in its behalf. It charges that the respondent is occupying and performing the duties of an office of the State, which, owing to certain facts alleged, he is not entitled to hold, and that he is holding such office in direct violation of a provision of the Constitution of the State. This charge is not frivolous upon its face, but is very serious, a direct palpable infraction of the highest law of the State.

There is no proceeding known to the common or statute law, applicable to the remedying of such wrongs, except by *quo warranto*.

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The proceeding of impeachment can only go against those who are guilty of high crimes and misdemeanors *in office*, or certain malconduct while in office, rendering them unfit longer to be entrusted with power.

The charge in the information is not one of unfaithfulness or malfeasance in office, but that he is forbidden by the Constitution to hold the office he occupies.

This proceeding in reference to high offices of the State, is almost universally instituted in the highest courts of the State or nation, and the highest law officer of the State is always the person who prosecutes; the object being to protect the people against unlawful intrusion into their offices, and contempt of their laws.

An office, in this country, is a franchise of the people, and their prerogative; in England, a prerogative of the crown. The Attorney-General is the attorney and legal guardian of the people, or of the crown, according to the form of government. His duties pertain to the Executive Department of the State, and it is *his duty* to use means most effectual to the enforcement of the laws, and the protection of the people, whenever directed by the proper authority, or when occasion arises.

It was said upon the argument, that the court should always inquire who was the real relator. This is true of that class of cases to which the authorities quoted uniformly refer, to wit: inquiries into the exercise of corporate or private franchises; but not a single instance was referred to, wherein a relator appeared in the inquiry by *quo warranto* into the right to a public office of State, (except in the cases where some person claimed the office held by another,) and in no instance have we found that any attempt has been made to impugn the motives of the Attorney-General, or to call them in question. When this officer prosecutes, the courts do not inquire after any other relator, but presume he will not prostitute his office to dishonorable purposes.

At the common law, no one but the law officers of the crown

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could sue out the writ of *quo warranto*. It was regarded as the King's writ of right, to be issued in case of the usurpation of an office in violation of the King's right. This writ, at an early day, gave place to the more convenient proceeding of an information in the nature of a *quo warranto*. It was the practice of the officers of the crown to file informations in their own discretion, upon the application of private persons; but these were not named as relators in the proceedings. (Cole on Information, 127.) By the act of 4 and 5 Will. and Mary, ch. 18, which took effect, in 1693, which was passed to prevent frivolous informations, no information could be filed "without express orders to be given by the court of King's Bench in open court." The statute of 9 Anne, ch. 20, 1711, required that in informations relating to *corporate* offices or franchises the name of the relator should be mentioned in the information.

It is quite possible that cases may arise, in which the disturbing influence of party feeling may so affect the action of the Attorney-General as to result in great injustice to individuals.

But this is a question for the consideration of the Legislature, not for the courts. The power of determining whether the action shall be commenced, must exist somewhere. As we have seen, it has sometimes been vested in the court and sometimes in the public prosecutor. Our legislature has not seen fit to make any change in the common law rule. The office of the Attorney-General is a public trust. It is a legal presumption that he will do his duty, that he will act with strict impartiality. In this confidence he has been endowed with a large discretion, not only in cases like this, but in other matters of public concern. The exercise of such discretion is in its nature a judicial act, from which there is no appeal, and over which the courts have no control. 3 Abbot, 131.

Rawle on the Const., p. 128, says: "At common law there are two modes of instituting such prosecutions, one of which is by an information, filed by the officer who represents the public, on his own judgment and discretion, which, if unadvisedly

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or corruptly done, may subject an innocent individual to very causeless pain and expense.”

In *Rex vs. Marsden*, 3 Burrows, 1812, which was an information, the defendant’s counsel says: “The Attorney-General is to judge of the prerogatives of the crown.” And Justice Wilmot, in the same case, (p. 1817,) says: “The old writ of *quo warranto* is a *civil* writ at the suit of the crown; it is not a criminal prosecution. Then informations, in the nature of a *quo warranto*, came into use, and supplied their place. In all the cases I could find, all informations of this suit were filed by the Attorney-General.”

Lord Mansfield declared (in *Rex vs. Philipps and others*, 3 Burr., 1565), that the *Court* would never grant an information upon the application of the Attorney-General in cases prosecuted by the crown, because the Attorney-General has a right in himself, *ex officio*, to exhibit one; that he must use *his own discretion*. And see the same Judge in *Rex vs. Phillip, Mayor, &c.*, Burr, 2089. See also 3 Stephens, N. P. 2432. In the *Commonwealth vs. Fowler*, 10 Mass. R., 293, which was a *quo warranto* case, Mr. Ashmun, counsel for respondent, said: “The court take notice of the relators, when an information is filed; and where a high judicial officer is the object of the prosecution, they will require either that the legislature authorize the proceeding, or that the regular and responsible organ of the government do it *in his own name by virtue of his office*,” Jackson, J., in the same case says: “The Solicitor-General, having, *ex officio*, a right to do so, has filed this information.” Sewall, J., says: “Proceedings of this nature are to be instituted by a regular officer of the government. When he files an information I think we are bound to presume that he files it *ex officio*.” Parsons, C. J., says: “It is not disputed that the Attorney and Solicitor-General respectively have full authority to file informations of this kind by virtue of the general powers of their offices. In such cases, as in all their official acts, they are accountable to the government for their conduct.”

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The Governor of the State embodies the supreme executive power of the State. Sec. 17 of Art. V. of the Constitution says that the Governor shall be *assisted* by a cabinet of administrative officers, consisting of a Secretary of State, Attorney-General, and other officers. Sec. 3 of Art. VII. says the Attorney-General shall be the legal adviser of the Governor. * * * and shall perform such other legal duties *as the Governor may direct*, or as may be provided by law.

The information in the present case, then, is filed by the Attorney-General, in his own discretion, or in obedience to the directions of the Governor, and the filing of the information is an act of an officer of the Executive Department of the government.

The respondent alleges that it emanates from the Executive himself; and if this be true, we are substantially asked by the respondent to lay the judicial hand upon the Executive and say to him, "you shall not perform certain of your official functions, without the consent of some other department of the government. When you desire to enforce any of the laws, you shall first obtain our consent; when you undertake to prosecute suits you must first ask of us the *privilege of exercising your discretion*." The effect of this would be to destroy the independence of a co-ordinate department; to invade and usurp the high duties of that department. Executive duties and powers belong to one department; ours to another. Were we thus to step in and undertake to control his actions in the premises, a due regard to his position and his duty to the State, would require him to treat with a deserved contempt any mandate of that character, as an usurpation and a crime. We should be guilty of a violation of the third Article of the Constitution, and well deserve the consequences due to such an act, without the poor excuse of temporary expediency.

When suits are instituted at the behest of the Attorney-General, the law officer of the Executive Department, we have but to hear the case and apply the law; and we can with no better

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grace pause and inquire into the *motives* of that department before proceeding to try alleged violations of law, which it seeks to bring to the notice of the courts, than we can question its *motives* in the making of appointments to office, or signing or refusing to sign the enactments of the legislature, or in ordering the militia to quell an insurrection.

We can not listen to an inquiry into the private motives of a high officer of the State, in performing official acts, but must leave those matters to the only tribunal provided by law for making and conducting such investigations.

What court, since the days of Jeffreys, has ordered a plaintiff to disclose his *motives* for bringing suits to collect debts, to recover damages for unlawful acts, or a public prosecutor to show that he has no private reasons for enforcing the law? Parties are to be protected against vexatious prosecutions at the hands of private persons, and this the courts may control in proper instances. Common barrators are punishable under the statutes. But this is the first instance that has come to our knowledge, in which a court has been invoked to stop an important State trial, instituted by the highest law officer of the government, and to use the power of one high department of the State, in the business of developing and exposing to the public the merits of a private quarrel between individuals occupying prominent positions in another department—the only fruit of which may be to involve the friends of the respective parties thereto in public scandal at the expense of the people.

We can only try the issues of law and fact which may be presented in this case, and must observe the well-settled rule of excluding all collateral issues from consideration.

The causes numbered respectively 9, 10, 11 and 13, set forth by the respondent, must therefore be struck out as irrelevant.

Motion granted.

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WESTCOTT, J., delivered the following opinion upon the same motion to strike out the ninth, tenth, eleventh, and thirteenth causes assigned in the answer to the rule:

These answers to the rule consist of allegations to the effect that these "proceedings are instituted by Harrison Reed (as a citizen, not as a Governor) from malicious, vindictive, and revengeful motives," and the court having a discretion in the matter, should refuse to permit the case to be further prosecuted. It is the practice for the respondent, in a proper case, to raise these questions upon the rule to show cause why leave to file an information should not be granted. Here there has been no such rule, and it is true that wherever the court would have refused leave to file the information, it will decline to grant the writ; hence this answer is as available to prevent the issuing of the writ as it would have been to have prevented the granting of the information. 12th Penn., 370.

In an ordinary action of assumpsit or debt it is true that any such matter as is herein alleged, if made the subject-matter of defense, would be stricken out; such, also, would be the rule in chancery causes, because such facts, if established, constitute no defense, and courts will not permit such harsh and abusive epithets to be applied by either party to the other. They subserve no good purpose, tend to establish no right, and are calculated to convert a judicial tribunal into an arena for the display of vindictive feelings through the instrumentality of insulting controversies.

How did it stand at common law, in a case of this character, and was there a discretion in the Court of King's Bench from which this writ issued to inquire into the motives of the Attorney-General, or of a third person at whose instance it was presumed he was acting? The ancient writ of *quo warranto* was in the nature of a writ of right for the King, its process was lengthy, and its judgment conclusive against the Crown. It was originally returnable before the King's Justices at Westminster;

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but after the first statutes upon the subject, (6th Edw. I., and 18th Edw. I., S. 2,) it was returnable *only* before the Justices in Eyre. After those Justices, the sole tribunal to which the writ was returnable under the statutes, gave place to the judges of the several circuits, the statutes themselves lost their effect. For this reason, and because the judgment was conclusive against the Crown in this proceeding, and its process very long, we find no further traces of a distinctive writ of quo warranto in English judicial history. It gave place to the proceeding in the form of an information. It would seem that the old writ was an exclusively civil proceeding. The conclusion of the judgment was, "*the defendant be in mercy,*" &c., as in all civil actions. 2d Kid., 209; 1st Blackf., 272.

If a fine was to be imposed, the King's Attorney-General, having the common law power to file an information whenever he was assured "that a man had committed a gross misdemeanor, either personally against the King or his government, or against the public peace," could do so by this means, for "there can be no doubt but that this mode of prosecution, by information, by the King's Attorney-General in the Court of King's Bench, is as ancient as the common law itself." 4th Black., 309.

Here, then, was a proceeding which, while the exclusive purpose was originally at common law to punish an usurper, yet it must, in order to reach this conclusion, determine the right or title to the franchise, to fix the usurpation, and convict of the misdemeanor; and herein would seem to be the reason for the difference mentioned in the books, between the character of the judgment in the old writ, and that in the proceeding by information. The judgment in the old writ being in the nature of a writ of right was conclusive against even the Crown, while, in the proceeding by information, the principal and only purpose of which at common law was generally to impose a fine, the judgment as to the franchise or office was not so entirely conclusive; indeed, if this idea be correct, it would seem that originally there could have been no objection to have proceeded at

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the same time, by writ of *quo warranto*, to determine the civil right, and by information to fine for the usurpation.

Thus we see how the information in the nature of a *quo warranto* originated, and we have a clear explanation of its character, as defined by the most elementary writers. "It is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seize it for the Crown; but it hath long been applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal only." 3d Black., 263.

It is "a remedy given to the Crown against such as have usurped any office or franchise, being properly a criminal prosecution, in order to fine the defendant for his usurpation, as well as to oust him from his office, yet at present considered as merely a civil proceeding." 4th Black., 310; 2d T. R., 484.

The old writ, for the reasons stated, passed away, and the information, the nature and character of which, except as to form, was essentially a civil as contra-distinguished from a criminal proceeding, took its place; that is to say, the information in the nature of a *quo warranto* took its place, being applied to the purpose of trying the "civil right," the fine being for the most part a fiction, as it was nominal only. Thus understanding the character of an information in the nature of a *quo warranto*, let us revert to the question to be determined.

When the King's Attorney-General desired, "*virtute officii*," to prosecute it in the Court of King's Bench in a case such as is now under consideration could the court inquire into his motives, or the motives of a third party, presumed to influence his action, and dismiss the proceeding?

The rule of practice applicable to other informations, in this respect, is applicable to this information; and at common law, not only the King's Attorney-General, but his Coroner, and Master of the Crown Office, could file without leave.

"For as the King was bound to prosecute, or at least to lend

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the sanction of his name to a prosecutor, whenever the grand jury informed him upon their oaths that there was a sufficient ground for instituting criminal suit, so, when these, his immediate officers, were otherwise sufficiently assured that a man had committed a gross misdemeanor, either against the King or his government, or against the public peace, they were at liberty, without waiting any further intelligence, to convey that information to the Court of King's Bench by a suggestion on record, and to prosecute it in the King's name;" "and the power of filing informations without any control at this time resided with the Master of the Crown Office even." 4th Black., 309, 310, 311, and 312.

The statute of 4th and 5th William and Mary, provided that informations in the Crown Office should not be sued without express orders, in open court.

When this general statute came to be construed by the English courts, it was in substance held that, though an information, in the nature of a *quo warranto*, was a proper remedy to try a right in respect of which it might not have come in strictness within the meaning of the words "trespasses, batteries, and other misdemeanors, in the statute, yet it being possible to fine for a misdemeanor, and the proceedings being vexatious, it was within the statute, which being a remedial law shall receive as large a construction as the word will bear." 1st Salkeld, 55 and 376; 1st Tomlin. L. D., 197.

It was held that this statute extended to all informations except those exhibited in the *name of the Attorney-General*. 3d Stephens, *Nisi prius*, 2432 and 33; 2d Tomlin. L. D., 195.

This species of information was further regulated by another statute, 9th Anne, Chap. 20, which provided, if any person or persons should usurp certain offices of corporations, the proper officer of the Court of Queen's Bench might, with leave of the court, exhibit an information, in the nature of a *quo warranto*, at the relation of any person desiring to prosecute the same against such person.

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The conduct of the relator here will experience criticism at the hands of the court, and the consequences of granting the information will be weighed. 3d Stephens N. P., 2433.

It was never, however, held that either of these statutes controlled or affected the common law power and discretion of the Attorney-General, or gave the courts a discretion to look at the motive, and quash the information, in their discretion, when filed by him.

In a case of such importance, and which is to establish the practice in this State, we think it not improper to quote at length, as reported, a case in which this question arose before Lord Mansfield. Rex vs. Mayor of Plymouth, 4th Burr., 2089.

"The Attorney-General moved for a rule upon defendant to show why an information should not be granted against him."

"Lord Mansfield asked him on whose behalf he moved this."

"Mr. Attorney-General declared on behalf of the Crown."

Whereupon Lord Mansfield rejected the motion, declaring that he would never grant a motion for an information applied for *by the Attorney-General* on behalf of the Crown, because the Attorney-General has, himself, power to grant it, if he judges it to be a proper case for an information. It would be a strange thing for the court to direct *their officer* to sign an information which the Attorney-General might sign himself if he thought proper; and if he did not think it a proper case, it would equally be a reason why the court should not intermeddle. "If it appears to the King's Attorney-General to be right to grant an information, he may do it himself; if he does not think it so, he cannot expect us to do it."

This, it is true, was not an information in the nature of a *quo warranto*, but the same rule was applicable to it, when the Attorney-General proposed to act. It will be remarked that this motion was denied in 1767, long after the passage of 4th and 5th W. & M., and 9th Anne.

So it is evident that if the rule in the English courts in 1767, and anterior to that time, is to prevail here, whether these stat-

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utes be operative in this State or not, (a question we do not decide, as it is immaterial,) there can be no power in this court to exercise the discretion asked in this case, even admitting the facts as alleged.

Without any express judicial authority upon the subject, it was insisted elaborately and ably by respondent at bar that while this matter was left in England to the discretion of the Attorney-General, there was no such discretion here; that the investment of such extraordinary power in one of the officers of this State, a power which enabled him, at his discretion, to call into question the right of any person elected by the people to exercise their offices, was inconsistent with the elementary principles of our government; and that while it might be true in England, where the King is esteemed to be the fountain of all power and justice, that his Attorney-General, representing him, might and very properly should be invested with the exclusive discretion of calling upon any one to show by what warrant or authority he exercised the King's liberties or franchises, yet that in this country, there being no King, a discretion at common law vested in the King's Attorney-General could not, by any proper analogy, be held to operate in like manner with the Attorney-General of a State; that while as to matters of contract, &c., the common law might be applicable, yet that discretions vested in officers of a monarchy could not be held to vest in officers, although of the same name, in a republic.

Admitting the force of this argument, we cannot see that it establishes the proposition *that the court has the discretion to quash*; the conclusion to be drawn from these premises is rather that the Attorney-General cannot prosecute the action, and hence it cannot be prosecuted at all, for, strictly speaking, he is the only one authorized to do it, for we have here no King's Coroner, or Master of the Crown Office. The argument being that while this is an incident of the office of Attorney-General in England, the powers of the Attorney-General of a State are not analogous to his, the result would be that he can-

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not prosecute the information. We cannot see that these premises establish the conclusion that *the court has the discretion claimed* to dismiss. Because there may be a difference between the power of the King's Attorney-General and the State's Attorney-General, is no reason why there should be greater power in the court.

But leaving this argument and looking to judicial decisions, what is the rule in the United States upon this subject as it appears from the general current of authorities?

Quite a number of cases were cited at bar in which courts exercised a discretion in the matter of information of this character, filed at the instance of relators to try the right of a party to a corporate office or franchise. Among the citations were: 4th Cowen, 106.

This citation is a reference to a note by the reporter of the case of *People vs. Richardson*; and its reference to sustain the doctrine of discretion is to 6 Term Reports, 509, which was an information filed at the instance of one corporator against another. The distinction between the case at bar and this one has been pointed out.

7 Penn. State Repts., 34, was an information at the suggestion of an individual to try the right of Edgar Cowan to the office of judge of a district, and the court ruled that a writ of *quo warranto* did not lie, except at the suggestion of the Attorney-General, against one holding a public office of this character, and that the remedy at the suggestion of an individual was confined to private injuries.

The court remarked, in the consideration of this case, that the office of Attorney-General was a public trust which involved the exercise of an almost boundless discretion. The officer acts under the obligation of an oath at the peril of impeachment.

This case seems to hold very clearly that the discretion in a case of this kind is alone with the Attorney-General.

5th Richardson, 302. The Attorney-General had nothing

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to do with the proceeding in this case, and it was to try the title to the office of Mayor of Charleston.

12th Penn., 365, was also to try the title to an office of a municipal corporation.

7th Richardson is a case in reference to a bank.

6 B. Monroe, 399, was a case in which the Attorney-General "disclaimed the prosecution."

1. Douglass, Mich. Rep'ts. The Attorney-General does not appear here, and there was a relator.

No authority cited sustains in the least the proposition that this court has a discretion for the causes assigned to dismiss this proceeding.

The citation, 7th Penn. State Reports, 34, shows the rule in that State. The discretion is with the Attorney-General.

In Massachusetts the rule is stated in 10th Mass., 298. In this case the House of Representatives of Massachusetts had requested the Attorney-General to file an information against Samuel Fowler, who was at the time exercising the office of Judge of Probate of Hampden county, whereupon, by virtue of this power, and of this authority, and in accordance with the request, he did so. The respondent moved to quash upon the ground that the information was not filed by him *ex officio*, but at the behest of the Legislature. Parsons, C. J., said the Attorney-General has full authority to file an information of this kind by virtue of his office. In such cases he is accountable to the government. The following authorities show this to be the view in other States in the absence of statutory provisions: 5th Rh. I., 6-8; 2 Rh. I., 7; 30th Ala., 67; 2d Texas, 159; 4th Texas, 406; 1st English, 231; 6th B. Monroe, 398.

Such would seem to be the result of the views of Sanderson, C. J., in 28th California, 139.

The following, which is the last case I cited that has a bearing upon this subject, expresses my own views.

An information in the nature of a *quo warranto* may be filed at the discretion of the Attorney-General in a case of this char-

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acter. The proper process "issues on demand of the proper officer of the State, as a matter of course, and there is no more necessity for an application to this court for this writ than there would be for a summons in a circuit court when the State is about to commence an action of debt against one of her debtors. No reasons are offered why the writ should issue, no information is communicated by affidavit or otherwise, and there is no power in this court to refuse issuing the writ. Why ask leave? It is the admission that this court has a discretion, whereas none is conceived to exist." 8th Missouri, 331.

Under the laws of this State, the Attorney-General is as much the representative of the State of Florida in the Supreme Court, as the King's Attorney-General is his representative in the Court of King's Bench; indeed, more so, as in the Court of King's Bench there are for certain causes representatives of the King's other than the Attorney-General; while here, it is his sole duty to "appear in and attend to, in behalf of the State, all suits or prosecutions, civil or criminal, or in equity, in which the State may be a party, or in anywise interested, in the Supreme Court of this State." Acts of 1845, page 5.

The office of Attorney-General is, in many respects, judicial in its character, and he is clothed with a considerable discretion. The appropriate and proper function of courts is to hear causes that the citizen of the State may see proper to institute, and there are but few cases in which they can exercise a discretion to refuse to hear them. The Attorney-General being intimately associated with the other departments of the Government, being as well the proper legal adviser of the Executive as the Legislative department of the Government, it is highly proper, whenever the right to a public office is to be tried, that he should be clothed with a discretion in the premises which should be exercised at least independently of the courts in actions of this character. A careful review of the cases in the books will show that the records disclose that in almost every case of this

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kind there is more or less political feeling, and the case at bar discloses no less, and indeed much more, of this than is usual. Is it to be said that it is a function appropriate to a court to weigh the motives of contending political factions, examine into their various political theories, attempt to enter into their breasts, and determine motives? Are they to measure with microscopic analysis, and ascertain whether there is passion and prejudice, and after ascertaining that there is, to fix by judicial determination just how much of each, or either, or both, is necessary to remove a case from judicial scrutiny?

The court cannot criticise the motives of a party acting as an officer; it may, in some cases, exercise a discretion where a relator clothed with no official discretion asks its aid. In him are vested no public rights, no governmental discretion, and he seeks a judicial tribunal as an individual, and should not be permitted to inquire into rights to franchise unless the public is promoted thereby.

This discretion is vested in the Attorney-General; if he exercises it improperly, there is another tribunal, the people, or their grand inquest, the Assembly, to punish him.

After argument upon the fifth and sixth causes assigned by respondent why the writ should not issue,

RANDALL, C. J., delivered the opinion of the court.

The fifth and sixth causes assigned why the writ should not issue as follows:

“Fifth. Because the said Almon R. Meek, represented in the said rule of this court to show cause as being the Attorney-General of the State of Florida, is not the Attorney-General of said State, nor are the said proceedings instituted or prosecuted by the Attorney-General of said State, and because the said

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Almon R. Meek, claiming to exercise the functions and authority of Attorney-General, was appointed by Harrison Reed, Governor of the said State, after he had been impeached by the Assembly of said State, and before his acquittal by the Senate, and was, therefore, by the Constitution of said State, under arrest, and disqualified from performing any of the duties of his office."

"Sixth. Because at the time of the institution of the proceedings in this case, and at present, F. A. Dockray was and is the legal Attorney-General of the State of Florida, he having been appointed to that office by the Lieutenant and Acting-Governor of the State, William H. Gleason, after the impeachment of the said Harrison Reed, and before his acquittal by the Senate, upon whom at that time, and before, had devolved, by the Constitution of the State, all the powers and duties of government."

We will examine these propositions carefully.

1. This suit is prosecuted for the purpose of testing the right of the respondent to occupy the office of Lieutenant-Governor.

2. The respondent proposes to try the right of Governor Reed to perform the duties of the office of Governor.

3. The respondent proposes to investigate the title of Almon R. Meek to the office of Attorney-General.

4. The respondent seeks to establish the title of Mr. Dockray to the office of Attorney-General, by virtue of an appointment made by himself as Lieutenant-Governor acting as Governor by virtue of the alleged impeachment and suspension of Governor Reed.

Were we to enter into this investigation of the rights of the several other persons named to the offices referred to, we could yet render but one judgment, and that affecting only the respondent. The other parties named, not being parties in this proceeding, would not be concluded by the judgment. Each of them has a right to make such issue as may be necessary upon

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the law and the facts in his own case, and is entitled to the verdict of a jury thereon if properly demanded.

It is not disclosed to the court how all these things are to be done in this case, and the books are silent as to any proper mode of proceeding to that end.

On the contrary, we find it to be utterly impracticable.

The information was filed by Almon R. Meek as the Attorney-General of the State. This court recognized him as such officer, and took notice, judicially, of the fact, as it recognizes other of the principal officers of the departments of government. We recognized him as we recognize the Treasurer or Comptroller; as we recognize the Senate and Assembly and its officers when the Legislature is in session; and we recognize his appointment as Attorney-General as an act of the Executive Department, as we take notice of the acts of the Legislative Department. These are all acts appearing of public record, and therefore of public notoriety and reputation. It would be novel, indeed, to require of the Attorney-General to exhibit his commission, and then to investigate the circumstances and reasons which induced an acting Governor to issue it, whenever he came before the court to prosecute for, or to defend the State, at the suggestion of an opposing litigant. His commission is his private property, and is his means of protection when his doings are attacked, provided that when the commission itself be attacked in a direct proceeding, its validity may be investigated. A collateral impeachment of his commission might likewise be attempted in each and every proceeding instituted by him, and the judgment of the court upon the question thus raised would not make him either more or less secure in the possession of the office. The Executive Department recognized and held out to the public that he was the acting Attorney-General. The archives and records of the State also proclaimed the fact that he had been commissioned and qualified, and there can be no higher evidence of the fact. But it is said that he is an usurper. That is what is charged against the

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respondent; but the respondent came into office under color of an election, and his acts as Lieutenant-Governor are as valid and binding upon the State and upon courts as though his right to the office had never been questioned. This court recognizes him as the Lieutenant-Governor, yet not by reason that any evidence of his election has been presented, nor can such evidence be required except the fact of election be put in issue in a direct and proper manner. And so this court has not before it, upon its record, any evidence as to who was elected as Governor, or who was appointed to the office of Comptroller. Yet we recognize as a public, palpable fact, not who may be *entitled* to occupy those offices, but who, *de facto*, occupies them and performs their functions. This court has recognized, and no one questioned its right so to do, the persons of the Governor and of the Lieutenant-Governor, and their official habiliments, and their signatures; has received from and transmitted to each of them official communications, without other proof of their identity, their election, or their signatures, than such as every officer or citizen of the State had of those facts. We should scarcely have been warranted in requiring testimony on each occasion, as to the eligibility, election, oath of office, and sign manual of the person occupying the Executive department under color of right, before giving response to questions which *the Governor* had a legal right to propound, and to which we were required to respond.

The well-known and well-settled rule of the judicial recognition of officers, is acted upon every day throughout the country. Without it the wheels of government would be clogged. The circuit courts, county courts, and justices of the peace recognize the persons and the signatures of sheriffs, constables, and other officers; and what would be said of the acumen of any of these courts, if upon every occasion of the service of process or official certificate, a defendant should be permitted to challenge and put to the proof the persons and signatures of those officers, and attempt, thus collaterally, to try the right

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of office of the person recognized and reputed to be the officer?

It can scarcely be necessary to prove the correctness of our position by citing the adjudications of courts and of eminent jurists, yet, as some of the questions which have arisen in this case have not been passed upon by the courts of this State, it may not be out of place to do so.

The questions raised are, whether the court will take judicial notice who are the acting principal officers of the State; the validity of the acts of officers *de facto*; and whether the title of an officer *de facto* can be attacked and adjudicated in a collateral proceeding.

“Courts take notice of the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government; and of the local divisions of their country into States, provinces, counties, cities, towns, local parishes or the like, so far as political government is affected; and of the relative positions of such local divisions. They will also judicially notice the political Constitution or frame of their own Government; its essential political agents or public officers, sharing in its regular administration, and its essential and regular political operations, powers, and action. Thus, notice is taken, by all tribunals, of the accession of the Chief Executive of the nation or State under whose authority they act; his powers and privileges; the genuineness of his signature; the heads of departments, and principal officers of State, and the public seals,” &c., &c. See 1 Greenleaf’s Ev., Sec. 6, and authorities cited; also Sec. 479. “It has been already seen that courts will judicially take notice of the political Constitution or frame of government of their own country, its essential political *agents* or *officers*, and its essential ordinary and regular operations.” 1 Mann, (Mich.,) 227.

The courts of the United States will take notice of the persons who, from time to time, preside over the patent office,

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whether permanently or transiently. York, &c., R. R. Co. vs. Winans, 17 How., 30.

In the case of The State vs. Williams, 5 Wis. R., 308, which was that of an alternative mandamus against the respondent requiring him to perform a certain duty required by an act passed by the Legislature, or to show cause, &c., the question was raised, that the law in question had been approved by one Barstow as Governor, whereas it was alleged that the term of office of said Barstow had expired prior to said approval, and that he wrongfully held the said office at the time of the passage and approval of the said act, and that one Bashford was at the time, the rightful Governor, and had been duly sworn into office before the said passage of said act, but that said Barstow retained possession of the Executive office, approved said act as Governor, and that the act was never presented to Bashford, the lawful Governor, for his approval, and was therefore not a law. The Chief-Justice, in delivering the opinion of the court, says that this position cannot be sustained. "Courts *take notice* of the accession to office of officers of this description, *without proof*, and although this does not prevent courts from inquiring into their right to hold office, by an information in the nature of a *quo warranto*, still, while they remain in office, courts will take notice of the fact, and regard them as officers *de facto*. The general doctrine that the acts of officers *de facto* while in office are good as to third persons, we suppose to be too well settled to require the citation of authorities to support it; and we cannot perceive how this case differs from the ordinary one of an office unlawfully held by one, *to the exclusion of the person who is lawfully entitled to it.*" And though, after the approval of the act by the usurping Governor, the same court, by means of the *quo warranto* proceedings, pronounced judgment of ouster against him, and the lawful Governor was duly admitted to the office, before this case arose, yet the court applied to the acts of Governor Barstow, while he had possession of the office, the rule uniformly applied by the courts to the acts of officers *de facto*.

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Another case arose subsequently (9 Wis., 264) before the same court upon *habeas corpus*. The petitioner was convicted of an assault and battery before a municipal court, the judge whereof had been elected at an election held some time after the passage of the act authorizing such election, but *before the act was in force*. The prisoner prayed a discharge on the ground that the judge was not legally in office. The court say, that "without determining what effect this would have upon the title of the judge or clerk of that court to their respective office, in a direct proceeding to test their right, yet an election having been held, and they elected, and having entered upon the actual exercise of the duties of the offices, we think, after the law became operative, so that the offices were legal, they were officers *de facto*, and that their right to hold the offices cannot be inquired into in a collateral proceeding of this kind. It is not an inquiry into the jurisdiction of the court, which may always be inquired into; it is an inquiry into the right of the judge to hold his office, which is a question entirely distinct from that of the jurisdiction of the court over the offense. Neither do we say that it cannot be inquired into on *habeas corpus*, whether the officer sentencing a prisoner was an officer *de facto*. That inquiry might undoubtedly be made; because every person assuming to exercise the authority of an officer, does not thereby necessarily make himself an officer *de facto*. But when it appears that the person exercising the powers of an office is in by such a color of right, and that he has such possession of the office as makes him in law an officer *de facto*, then his acts, as to third persons, are valid, and his right to hold the office can only be inquired into in some direct proceeding for that purpose. The trial and conviction of the prisoner having occurred after the law was in force, he could not, on *habeas corpus*, raise the question of the strict legal right of the judge to hold the office." This judge was, in fact, ousted from office by *quo warranto*, on the ground that his election was irregular and void, yet none of his judgments were disturbed by reason of

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his want of legal title to the office. The court is fully sustained by Fowler vs. Beebee, 9 Mass., 231; Comm. vs. Fowler, 10 Mass. 305; Case vs. The State, 5 Ind., 1; Pritchett vs. The People, 1 Gilm. (Ill.) 525; 24 Ill., 184; Town of Lewistown vs. Proctor, 23 Ill., 533; 1 Denio, 574; 5 Wendell, 233; 7 Johnson, 549; 9th do., 135; 3 Bl. Com., 262; 24 Wend., 520; Greenleaf's Ev.; Phillips' Ev.; Starkie's Ev.; Angell & Ames on Corp., 274; King vs. Bedford Level, per Lord Ellenborough, 6 East., 368-9; 1 Lord Raymond, 658; 12 Wheaton, 70; 1 Harris and Gill, (Md.,) 421-2; 14 S. & Rawle, 405; 1 Peters, 46.

The rule applies to ministerial and judicial officers alike. The King vs. Lisle, Andrews, 163; 9 Johns., 135; Viner's Abr. Tit. Offices; Harris vs. Jays, Cro. Eliz., 699; 15 Mass., 180; 5 Wend., 231; 13 Johns., 218.

"An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." Lord Ellenborough, 6 East., 368-9.

"A person by color of election may be an officer *de facto*, though indisputably *ineligible*; or though the office was not vacant, but there was an existing officer *de jure* at the time." A. & A., 274.

In the Supreme Court of New York, (3 Barbour, 162,) a writ of *habeas corpus* was sued out for the purpose of obtaining the discharge of a prisoner, on the ground that the act of the Legislature, under which the committing magistrate was elected, was unconstitutional, and conferred no authority upon the magistrate. The court held that the act was unconstitutional, (and the case seems to have been made and argued for the purpose of testing that question,) and yet the prisoner was remanded. Judge Edmonds, in his opinion, says, "The writ of *habeas corpus* was invented for a very different purpose from that assigned to it on this occasion. It may sometimes, with propriety, be used as a writ of error, but I am yet to learn that it can ever properly be converted into a *quo warranto*. The *habeas corpus* is a writ of

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right to which every person is entitled, *ex merito justitiae*. The *quo warranto* can be sued out only by the Attorney-General; and it is at his option whether he will give any party the benefit of it." Yet in this case, under the pretense of relieving against an abuse of the right of personal liberty, the court, by means of a writ which it is compelled to allow, is called upon to determine a question of usurpation of office, which the Attorney-General may consider as too clear to justify his interference; or which, for ought we know, he may already have definitely acted on. And to do that we are called upon to determine that Chancellor Kent was wrong in laying down in his Commentaries (2 Comm., 295,) that in the case of public officers, who are such *de facto*, acting under *color* of office by an election or appointment not strictly legal, their acts are valid as respects the rights of third persons who have an interest in them, and as concerns the public, in order to prevent a failure of justice. And that he was equally wrong when, as Chief-Justice, in answer to a proposition that an offender *de facto* is one coming into office by color of an election, and that all his acts are valid until he is removed, he remarked that the law was too well settled to be discussed. 7 Johns., 552.

And that the late Supreme Court was equally wrong in declaring that the acts of officers *de facto* are as valid and effectual when they concern the public as though they were officers *de jure*. The affairs of society could not be carried on upon any other principle. 5 Wend., 233.

This opinion, and the authorities referred to, in our view covers the suggestion that Governor Reed had been impeached before the appointment of Mr. Meek, and that he had not been acquitted by the Senate. The matter of the impeachment is suggested by recital; it is not directly alleged that Governor Reed had been impeached, but is referred to in the 5th and 6th clauses. But treating it as though it were an allegation that the Governor had been duly impeached and suspended, the well-settled rules above set forth are applicable, to wit: That Mr. Meek be

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ing in office, exercising the functions thereof under *color* of appointment, the only mode known to the law of testing his right is by a proceeding *against him* for that purpose.

Were such an issue permitted to be made in this case, it would be necessary to suspend these proceedings until that issue could be tried; and then, as has been suggested, we might be called upon with equal propriety, to pause in that inquiry and investigate the titles of three or four more of the gentlemen sitting in the Senate or Assembly in order to arrive at a conclusion. We can try but one case at a time.

We must refuse to enter into the investigation.

WESTCOTT, J., dissented from the foregoing opinion of the court, and delivered the following opinion:

The fifth cause assigned is, that Harrison Reed, Governor of Florida, had been impeached, and that his appointment of Almon R. Meek as Attorney-General was made after his impeachment, and before acquittal. The sixth cause is, that since this impeachment and before acquittal, and before this suit was instituted, F. A. Dockray had been appointed Attorney-General by the acting Governor, William H. Gleason, Lieutenant-Governor of the State.

Section 9, Article XVI., of the Constitution of the State provides that "any officer when impeached by the Assembly shall be deemed under arrest, and shall be disqualified from performing any of the duties of his office until acquitted by the Senate," and in case of the impeachment of the Governor the duties of his office devolve upon the Lieutenant-Governor. These answers allege that Harrison Reed, Governor, has been impeached and that since his impeachment, and before acquittal, he has appointed Almon R. Meek Attorney-General, who institutes this suit. If the matter alleged was that a judgment of ouster had

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been pronounced against the Governor, and that this appointment had been made since that judgment, then it could not be insisted that the parties could not produce that judgment by reason of the rule that a right to an office cannot be made the subject of a collateral inquiry, because a collateral examination is admissible to the extent of producing a judgment of ouster if one is alleged. The reason why a collateral inquiry as to the right cannot be had is, because the person whose right is in question, and is to be affected, has no notice, is not party to the suit, and it would be to determine his right in his absence; but when a judgment of ouster is offered, the court is not to *inquire into the right*, because the record shows that after hearing there has been a judgment by a court of competent jurisdiction settling the question. Impeachment when perfected, completely suspends all power of the Governor, and he can no more exercise any duty of his office after impeachment, and before acquittal, than he can after a judgment of ouster. I am of the opinion that the court should go so far into the examination as to ascertain whether the Legislature has taken such action as to place the Governor "in arrest, and to disqualify him from performing any of the duties of his office."

The appointment of the Governor, after impeachment cannot confer any more authority than an appointment by an individual, and if an impeachment was disclosed, and the appointment was after that date, the appointee would occupy no better position than if his appointment was made by some citizen. He would be in the position of one presuming to discharge the duties of an office to which he had *no color of title or right*.

The case from Wisconsin, mentioned in the opinion of the court (9 Wis., 264), states the principle in reference to such an inquiry. That court says: "Every person assuming to exercise the authority of an officer does not thereby necessarily make himself an officer *de facto*, but when it appears that the person exercising the powers of an officer is in by such a *color of right*, and has such possession of the office as makes him an officer *de*

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facto, his right to hold the office can only be inquired into in **some** direct proceeding for that purpose."

In 5 Wendell, 231, the court say that the mere claim to be a **public** officer, and the performance of even a number of acts in **that** character, would not constitute an individual an officer *de facto*. There must be some color of election or appointment, or an **exercise** of the office and an acquiescence on the part of the **public** for a length of time which would afford a strong presumption of at least a colorable election or appointment.

Whatever may be the rule in other cases as to officers *de facto*, **after** an impeachment under the Constitution of this State the **Governor** cannot by appointment create such an officer. When **officers** are impeached, the purpose of the Constitution is to **deprive** them of power. The views of the court, if I am not mistaken, would give the appointees of an impeached Governor the **standing** of officers *de facto* holding under color of an appointment, and the public must submit to their acts until direct proceedings are instituted and they are removed by the courts, and if it happens, as in this case, that the Attorney-General, the officer in whom the *discretion to institute these suits* is vested, is one of such appointees, we should have a remediless violation of the Constitution by his failure to use that discretion to accomplish **their** removal, while it would be at least doubtful whether any other officer could file an information against the Attorney-General himself. Taking judicial notice of the principal officers of the State government does not affect the question. The Governor is still Governor, though impeached; the office is not vacated until conviction. The Lieutenant-Governor simply discharges the duties of Governor as the result of an act of which the court does not take judicial notice. The court does not take judicial notice of impeachments any more than it does of other contents of legislative journals. They are proceedings judicial in their character, followed by a "*judgment*," and should be proved like other judgments. They are proved as other contents of legislative journals. I cannot agree with the

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court in its judgment, but think that we should inquire into the matter alleged to the extent indicated.

WESTCOTT, J., delivered the opinion of the court upon the remaining causes assigned by respondent, numbered *seven, eight, and twelve*:

The foregoing opinions cover the ground set up in the answers numbered seven and eight.

The twelfth ground alleged, is because the Constitution has given the power to the Assembly to impeach the Lieutenant-Governor, and the Senate to try and remove from office, and that the said bodies will soon be in session, and exercise the power if necessary.

This is purely a matter of judicial cognizance, and if the Legislature is to try judicial questions of this character, if it is a power legitimately within their constitutional authority, then we cannot exercise it. If it is judicial in its character, and within our powers, then the Legislature cannot. No person properly belonging to one of the departments of this Government can exercise functions appertaining to either of the other unless expressly authorized. The powers of the Legislative, Executive, and Judicial Departments are distinct, independent, and supreme in their legitimate sphere within the Constitution; neither can exceed it.

The cause alleged is insufficient.

Upon the announcement of the foregoing opinions of the court deciding the answer to the rule insufficient, the Attorney-General made and entered of record his certain motion, in the words and figures following, to wit:

IN THE SUPREME COURT OF THE STATE OF FLORIDA.

And now comes Almon R. Meek, Attorney-General of the State of Florida, in the matter of an information in the nature of a *quo warranto*, filed by the said Attorney-General in said

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Supreme Court against William H. Gleason, and moves the said court to make the rule *nisi* heretofore made in this court absolute, the remaining causes or grounds shown against said rule being insufficient and that said rule being made absolute, proper process do issue requiring said Gleason to answer to said information.

ALMON R. MEEK,

Attorney-General of the State of Florida.

Tuesday, 3 o'clock, P. M., Dec. 2d, 1868.

Motion granted.

Whereupon attorneys for the respondent, in the presence of respondent, waived the issuing and service of process, and appeared generally, and filed the following petition, counsel stating that with this act their connection with the case ceased:

To the Honorables the Justices of the Supreme Court of the State of Florida:

Petition of WILLIAM H. GLEASON, Lieut. Gov. State of Florida:

Your petitioner, William H. Gleason, Lieutenant-Governor of the State of Florida, respectfully represents unto this honorable court, that an information in the nature of a *quo warranto* has been filed in the said court, by leave thereof, on the motion of one Almon R. Meek, representing himself in the said information as the Attorney-General of the said State.

That upon the filing of the said information as aforesaid, a rule *nisi* was issued by the said court and served upon the said petitioner, requiring the said petitioner to show cause why a writ of *quo warranto* should not issue against the said petitioner, requiring the said petitioner to show by what authority he enjoys, exercises, and performs the functions, powers, and franchises of Lieutenant-Governor of the said State.

That the said petitioner specially offered to the said rule *nisi*, and in answer thereto set forth and showed to the said court that by reason of anything contained in the said information, he should not be required to show by what authority he exercises,

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enjoys, and performs the powers, duties, functions, and franchises of Lieutenant-Governor of the said State, for divers reasons and causes in the said answer specified, and for other reasons and thereupon moved the said court to discharge the said rule *nisi*, and that the proceedings instituted in the said court by the said Almon R. Meek against the said petitioner by the said information and rule *nisi* be quashed.

Your petitioner further represents unto the honorable court, that among other reasons stated in the said answer to the said rule *nisi*, your petitioner set forth and stated that the said Almon R. Meek was not Attorney-General; that Harrison Reed had appointed the said Meek Attorney-General after the said Harrison Reed had been impeached by the Assembly of the State of Florida, by virtue of the power therein vested by the Constitution of the said State; and was therefore, under the said Constitution, and by the authority thereof, under arrest and disqualified from performing any official power or duty until acquitted by the Senate of the said State.

That the said Harrison Reed had caused the said proceedings to be instituted against the said petitioner for the purpose of revenge and malice against the said petitioner, as therein stated and appearing; that the said Reed urged the nomination and election of the said Gleason as Lieutenant-Governor of the said State, and voted for his election, and has acquiesced in his election as valid; and that the said Reed had caused the said proceedings to be instituted for vindictive purposes after he had been impeached as aforesaid, and for the reason that the said Reed charged the said petitioner with having influenced his impeachment.

Your petitioner further represents that he alleged in the said answer that the public policy and interest of the said State did not require the action of the said court upon the case made by the said information; and that the said Almon R. Meek was not prosecuting the said petitioner as the legal Attorney-General of the said State.

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That the said court had illegally granted leave to file the said information upon the said motion; that the said court had no jurisdiction over such proceedings as aforesaid against this petitioner as Lieutenant-Governor; that if it had jurisdiction it would be an improper use of the power of the said court to allow the proceedings aforesaid to proceed and be prosecuted against the said petitioner.

Your petitioner states that this honorable court held that the said information was legally instituted; and that the motives and purposes aforesaid of the prosecution against your petitioner could not be inquired into; and thereby held that the same did not constitute any sufficient defense against the said information; and that the said court had jurisdiction over the said information.

Your petitioner further represents that the said information admits that this petitioner has been elected to the office of Lieutenant-Governor by the people of the said State; and insists that he was not three years a citizen of the State when he was elected by the said people.

Your petitioner further shows to this court that the said question of ineligibility stated in the said information, for want of three years' residence, was decided by the people in their sovereign capacity in the said election; and for that reason, which this honorable court should take judicial notice of, the said court should not have granted the said rule, nor allowed the said proceedings to be prosecuted.

That the said court should have taken judicial notice of the fact that this court cannot, in the exercise of any constitutional power, call upon this petitioner to show his authority to act as Lieutenant-Governor, inasmuch as the said information admits that he was elected by the people of the said State, by which he is vested with his authority as Lieutenant-Governor.

Your petitioner further respectfully represents that there is no person in the State of Florida claiming the office of this petitioner nor contesting his election; and that this said informa-

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tion is not prosecuted in the name and by the authority of the people of the said State, nor do they require, ask for, or demand the said prosecution.

Your petitioner further represents that he has been wronged and injured in the premises, and subjected to great expense in defending the said prosecution instituted against him contrary to the constitutional and legal rights and privileges of this petitioner.

And your petitioner respectfully informs this honorable court that he does hereby remove the case made by the said information against this petitioner to the United States Circuit Court in and for the Northern District of Florida, to be held at Tallahassee, in said State, in the exercise of his right under and in pursuance of the third section of an act of Congress of the United States, entitled "An Act to Protect All Persons in the United States in their Civil Rights, and Furnish the Means of their Vindication;" and the fifth section of an act of Congress entitled "An Act relating to *Habeas Corpus*, and Regulating Judicial Proceedings in Certain Cases," approved March 3d, 1863, and the third, fourth, and fifth sections of an act of Congress entitled "An Act to Amend An Act relating to *Habeas Corpus*, and Regulating Judicial Proceedings in Certain Cases," approved March 3d, 1863, and approved May 11th, A. D. 1866; and under all and every the sections and provisions of the said acts of Congress of the United States, and all other laws applicable thereto.

W. H. GLEASON.

Before me, Sherman Conant, United States Commissioner, in and for the Northern District of Florida, personally came William H. Gleason, the subscriber to the foregoing petition, who being by me first duly sworn, made oath that the statements contained in the said petition were true, so far as the same are stated of his own knowledge, and that those matters stated on information and belief are true according to the best of his knowledge, information, and belief. SHERMAN CONANT,

United States Commissioner.

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RANDALL, C. J., delivered the opinion of the court upon the foregoing petition:

After consideration of the matter of this petition we cannot see that this act of Congress has anything to do with this case.

Upon its face it has nothing more to do with the subject than an act of Congress making appropriations for the expenses of the government, or the construction of a light-house. It enables persons who, by the rules of practice of courts, acts of the Legislature, or fundamental constitutional provisions, are denied equal rights, such as to inherit property, to give evidence, to make contracts, and other rights enumerated, to carry their cases to a tribunal where they will have equal right to be heard, to give evidence, &c. As in this State there are no denials of this kind by any tribunal, but all have equal rights under the Constitution, there is no more necessity to construe this act in this case than any other act of Congress. The respondent is not such person as is denied any right; all courts are open to him, and he has full and equal benefit of all law.

The construction of the act as contended for, is such that it vests defendant with a discretion whenever he thinks a court, after a full hearing, has decided a question of law wrong, before final judgment, to stop its proceedings. With such a construction no case can be decided finally by the State courts, and all questions, whether arising under an act of Congress or the Constitution of the United States, or under a purely local statute, and State Constitutions, become the subject matter of review in the United States courts.

Are we to admit this construction and stay proceedings when we are trying a matter of constitutional construction, and which can in no manner be affected by an act of Congress, this State being a recognized member of the Union?

To do so would be to destroy all necessity for and power of State courts, and destroy all harmony between the courts of the

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United States and the State courts. It would result in a revolution in the judicial system.

This petition affirms that respondent has been "denied justice" by this court. The fact is, that the court has in this case subjected itself to just and well-deserved censure by those who know something of judicial proceedings, for the privileges extended, which the strict rules of law prohibited. This record is but a repetition of enlargements of rules, and the answers to some of them consist of matter already determined, and which for that reason should have been stricken out, and in any other case it would have been done.

What is complained of here as a denial of justice is its simple administration, which is never a denial, except with that class to whom its administration is the greatest wrong.

By the strict law of the case, as has been shown, respondent had no right to be heard until the summons in this case issued. The rule to show cause, and all of these proceedings up to this time, have been *ex gratia*. The rules of law would have justified the court in striking out all of the answers to the first rule and making it absolute, as the Attorney-General was entitled to it upon the simple filing of his information.

Lord Mansfield, in the case of Rex. vs. Wilkes, (2 Eng. Com. L. R., 2,) where he was threatened with assassination, and made the subject of libellous attacks in the press, saw proper to refer to these matters, and while we think that we cannot very properly criticise other assaults which the respondent may make, it is yet within our proper and legitimate province to subject his acts in these proceedings to judicial criticism when such assaults, however futile and absurd, are made here.

The person entitled to the benefit of the act referred to in this petition, commonly known as the "civil rights bill," are enumerated in said act, and are as follows: "All persons born in the United States and not subject to any foreign power * * are declared to be citizens of the United States, and such citizens, of every race and color * * * shall

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have the *same* right to make and enforce contracts; to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings, for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The third section, in pursuance of which, and other acts in Congress referred to, the respondent assumes to remove this cause to the Circuit Court of the United States, provides that the Circuit Courts shall have cognizance of all causes, civil and criminal, affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the State or locality where they may be, any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any *such* person, for any cause whatsoever, * * * such defendant shall have the right to remove such cause for trial to the proper Circuit Court of the United States, in the manner prescribed by an act relating to *habeas corpus*, &c., approved March 3, 1863, and all acts amendatory thereof.

Now who are the persons mentioned in the "civil rights bill?" They are "citizens of the United States," and none other. The petitioner does not allege that he is a person of that description—and here we might stop; but the petitioner does not state in his petition which of the "rights" to which citizens are entitled under the act, has been denied him by this court, by or under "any law, statute, ordinance, regulation, or custom of this State," or otherwise. He does not point out one, and his able counsel did not deign to state before the court any right or privilege secured to him under said act of Congress which he had not had the full benefit of.

Indeed the respondent has not, up to this time, demanded anything whatever, except that the suit be dismissed upon grounds

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not warranted by law ; and that we shall stop and first try several other suits against persons who were not before the court.

We are not called upon to pass upon the validity of an act of Congress, or upon any matter growing out of an act of Congress, and we have therefore not done so. The respondent has, by counsel, made a motion, and it has been denied, solely upon questions of practice in the court. If any act of Congress confers in terms or by implication upon any other tribunal an authority to wrest from the courts of a State their jurisdiction solely because a question of common law practice, or of construction of the State Constitution or laws, may be decided against a party, and, as in this case, not involving any law or treaty, or the Constitution of the United States, we shall be wanting in self-respect and common intelligence, if we do not resist it by all proper and necessary means ; and we are confident that this respondent would join in that feeling of contempt which the members of the bar and the country would feel for the conduct of this court, if we do otherwise than to disregard this petition.

The petition is set aside.

After considering the matter of the petition, the following demurrer was found on the files in this cause, viz.:

IN THE SUPREME COURT, STATE OF FLORIDA.

In the matter of the Information filed by ALMON R. MEEK, representing himself to be Attorney-General of the said State, vs. WILLIAM H. GLEASON, Lieutenant-Governor State of Florida.

And now the said defendant, William H. Gleason, Lieutenant-Governor of the said State, *in propria persona*, says that the said information is bad in substance, and for cause of demurrer says that

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First. That the said information is not prosecuted nor instituted as required by the 2d section of Article Six of the Constitution of the State of Florida.

Second. That there is no cause of action alleged in the said information sufficient in law to sustain the said prosecution against defendant.

W. H. GLEASON,

Sworn and subscribed to before me this third day of December, A. D. 1868.

CHAS. KENMORE,

Deputy Clerk Supreme Court.

And thereupon the said Almon R. Meek, Attorney-General, filed his joinder in demurrer in the words and figures following, to wit:

Almon R. Meek, Attorney-General of the State of Florida, says that the information filed by him in this cause is good in substance.

ALMON R. MEEK,

Attorney-General of the State of Florida.

December 3d, 1868.

After argument of counsel for the State upon the demurrer, the respondent having abandoned his case,

WESTCOTT, J., delivered the opinion of the court:

The first ground taken in the demurrer is:

“That the said information is not prosecuted nor instituted as required by the second section of Article Six of the Constitution of the State of Florida.”

The article referred to is in the following words: “The style of all process shall be ‘The State of Florida,’ and all prosecutions shall be conducted *in the name and by the authority of the same.*”

Strictly speaking, this matter has been “prosecuted” by the State of Florida, and it has been “instituted” by the Attorney-General of the State, which is a substantial compliance with the

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requirements of the Constitution. So far as the use of the terms "The State of Florida" is concerned, there is a substantial compliance with it in the information, the terms used being the "People of the State of Florida," which for the purposes of this proceeding is sufficient; yet the court is of opinion that to comply strictly with the constitutional requirement, the formal words therein required, viz.: "In the name and by the authority," should properly appear upon the face of the information. The proper signification of the term "*conducted*" as here used is, that the pleadings should be conducted in the name of the State, the case should be so docketed, and upon the records when stated should be so described, and hence that there is no defect.

While the judgment of the court sustained the demurrer as to the first ground taken during the progress of the trial, and such must be the character of this record for that reason, yet subsequent investigation has led us to a different conclusion.

During the dependence of the American Colonies indictments were "*conducted*" in the name of the King. Our first State Constitutions, after throwing off the Royal Government, provided that prosecutions should be carried on "in the name and by the authority of the Commonwealth."

It should appear sufficiently from the record that this is conducted by the authority of the State of Florida, and not by the authority of any other power. That is what the Constitution means.

The court held, in *Grierson vs. the State*, 5th Howd. Miss., 37, that "it was sufficient, if it appeared in the record that the prosecution was in the name of the State, and that a formal statement of the fact that the indictment was found by its authority was not necessary."

The court being clearly of the opinion that the defect set up, if one at all, is one of form simply; that this was a civil as distinct from a criminal case; that the information was amendable in this particular, and that an amendment placing these words

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in the caption would be sufficient, sustains the demurrer, with leave to the Attorney-General to amend his information.

This being the first case of the kind in this State, a short review of the authorities upon the two points; first, as to the constitutional requirement, and second, as to the matter of amendment, is not deemed inappropriate.

The Constitution of the State of Illinois required, that "all prosecutions shall be carried on in the name and by the authority of the people of the State of Illinois, and conclude against the peace and dignity of the same." The statutes of Illinois gave authority to the courts to fine in their discretion in *quo warranto* proceedings. We have no statute of this character here, and it is very doubtful whether, in the light of the Constitution, and the limitation which is made in our statute adopting the common law, this power of fining at the discretion of the court exists. Our statute is, "All offenses known to the common law, the punishment whereof is not provided by law, shall be punished by a fine not exceeding one hundred dollars, or imprisonment not exceeding twelve months, at the discretion of the jury." Thomp. Dig., 489.

In treating of an information of this character, 11th Ill., 553, Mr. Justice Caton says, "This proceeding is a proceeding within the meaning of the clause of the Constitution recited above. In its broadest sense the word prosecutions would embrace all protection or enforcement of a right, or the punishment of a wrong, whether of a public or private character. Our statute expressly provides, not only for judgment of ouster, but also that the defendant shall be punished for his usurpation by fine."

The information in this case concluded with the words "contrary to law, and to the damage and prejudice of the said people of the State Illinois."

The Constitution required, if a prosecution, that it should

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“conclude” in different *words*, and the court reversed the judgment which had sustained the information as sufficient.

The court in this case held that “whatsoever certainty is requisite in an indictment, the same, at least, is necessary in an information,” citing 2d Hawks’ P. C., 357, Sec. 4.

The citation will show that this language was used with reference to informations generally.

There is a marked difference between criminal informations generally, and informations in the nature of a *quo warranto*. Indeed, there are informations of intrusion and debt in the exchequer which are purely civil in their character. The extent to which the doctrine is carried in the above case would seem to bring a proceeding of this character within that clause of the old Constitution of the State of Illinois, providing “that no person shall be proceeded against *criminally by information for any* indictable offense except in cases arising in the land and naval forces, &c.,” and hence the act of 1845, authorizing *quo warranto* informations, passed before the new Constitution, was of questionable constitutionality.

The court, in 11th Ill., 553, held that a prosecution by information under the statute would be a bar to a prosecution by indictment under a distinct criminal statute imposing a fine for usurpation.

If the trial under one is a good bar to a trial under the other, it should operate both ways, and a remarkable result would seem to follow, viz.: that if a party was convicted and fined as an usurper under the criminal statute, there could be no proceeding to oust him from office afterwards under the *quo warranto* statute, and hence, no power in the courts ever to give a judgment of ouster.

With this construction it would also seem that the proceeding by information at the instance of the Attorney-General would have been unconstitutional, as a grand jury was requisite if it was a criminal offense within the meaning of that clause of the new Constitution of Illinois, providing that “no person

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shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury," except in certain cases in which this is not embraced.

The decision in Illinois carries the doctrine too far.

The proceeding is essentially civil, and the fine is never more than nominal, at common law, and it cannot be called a criminal case.

In the case of the State Bank vs. The State, 1st Blackford, 272, a more correct view, not leading to such conclusion, is taken. The court, at the time considering the objection that "an information in the nature of a *quo warranto* is a mode of proceeding not warranted by the Constitution, which provides that no person shall be put to answer any criminal charge but by indictment," says, "We have no need of resorting to the general doctrine on information, for a *quo warranto* information is a criminal proceeding only in name and in form; in its nature it is purely a civil proceeding," citing 2d Kid. on Corporns., 439; King vs. Francis, T. R., 484.

"In the language used in the" King vs. Mayor, &c., of Cambridge, cited in 2d Kyd., 483, the corporation is called upon to answer no *crime or offense*, but only touching its liberties. The primary and only material object of the proceedings is not the infliction of pains and penalties as in criminal proceedings, but to deprive the individual members of the supposed corporation of the privileges they claim to enjoy above the lot of the citizens in general. The fine inflicted on conviction is merely nominal. It is so immaterial a part of the proceedings that the books on the subject have almost lost sight of it.

The conclusion of the judgment, it is true, is said to be with a "*capias pro fine*," but this is more the form than the substance of the judgment, as in all civil actions founded in tort. When the proceedings are by *writ of quo warranto*, the conclusion of the judgment is that the defendants be in mercy, &c., as in civil actions founded on contract. 2d Kyd., 409. So that with us the fine may be very properly left out of the case,

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and then the proceedings are so exclusively of a civil nature as to form no colorable pretense for this constitutional objection.

In State on relation Brison vs. Lingo, 26 Mo., 496, the question arose in this way: There was a statute providing that the "Circuit Court of St. Louis shall not hereafter exercise original jurisdiction in any criminal case," a *quo warranto* information was filed therein, the question of jurisdiction was raised, and the case carried to the Supreme Court of Missouri.

The Supreme Court say, "The inquiry arises, is this a criminal case? For a great while it has been applied to the simple purpose of trying a civil right, and regarded as a remedy to try the right to office." The jurisdiction was sustained.

In the case of Rex. vs. Francis, 2 D. & E., 484, where a new trial was granted for the King, the court remarked, "The proceedings have been considered merely as civil proceedings of late years." The history of the information in the nature of a *quo warranto*, as detailed in a previous portion of this case, shows that it is essentially a civil proceeding.

The next question to be considered is whether the information is amendable.

In "The People vs. Clark, 4 Cowen, 95, the Attorney-General was permitted to amend by adding a new count to the information, the court remarking that the ordinary principles of amendment applicable to other sections were to this. After demurrer to an information, a judge's order may be obtained to amend. 4th Burrow, 2532."

Amendments on special motion, in these actions, appear to have always stood on the same footing as in other actions, Com. Dig., Quo War., (E. 4,) Rex. vs. Blatchford, 4 Burr., 2147.

In the very celebrated case of Rex. vs. Wilkes, 2 Eng. C. L., 320, which was highly criminal information, an amendment in substance was made by Lord Mansfield at Chambers upon motion. When this matter came up before him afterwards in term, for consideration, he says, "There is a great difference be-

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tween amending indictments and amending informations. Indictments are found upon the oaths of a jury, and subject only to be amended by themselves, but informations are as declarations in the King's suit. An officer of the crown has the right of framing them originally, and may, with leave amend in like manner as any plaintiff may do." 2d Viner Ab., 394. Title Amendment, pl. 12; 12 Mod., 229; 6 Mod., 281.

The doctrine of amendments has been extended in this State to a point much beyond what it was in England at the time these decisions were made, and we think the question clear.

As to the second point of the demurrer, we have only to say that the information appears sufficient, and no defect has been pointed out other than what has been considered.

The judgment of the court upon the demurrer is:

Upon considering the matters arising upon the demurrer of the respondent to the information filed herein by the said State of Florida by its said Attorney-General, it is ordered that the said demurrer is overruled, excepting so much of the first ground therein as relates to form, and as to the same, it is ordered, upon motion of the Attorney-General, that he have leave to amend the same instant, so that the said information shall read, "In the name and by the authority of the State of Florida."

It is further ordered that the said respondent, William H. Gleason, have leave to plead over to the said information by Saturday, December 12th, 1868, at 10 o'clock A. M., or show cause at that time why final judgment of ouster shall not be awarded against him.

It is further ordered that a copy hereof be served by the sheriff of this county upon the said William H. Gleason, the respondent.

And afterwards, to wit: On the ninth day of December, in the year A. D. 1868, the following return was made on the original order:

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“Executed the within by serving a true copy hereof on William H. Gleason, this the 9th day of December, A. D., 1868.

C. J. PORTER,

Deputy Sheriff Supreme Court.”

And afterwards, to wit: On the 12th day of December, A. D. 1868, appeared the respondent by his attorney, David S. Walker, in answer to the rule aforesaid, and moved the court to enlarge the rule to plead, or to show cause why judgment of ouster should not be entered against him, upon the ground that the amendment authorized had not been made.

Whereupon the Attorney-General, with leave of the court, filed his amendment heretofore authorized in the words and figures following, to wit:

IN THE SUPREME COURT OF THE STATE OF FLORIDA, AT AN EXTRA SPECIAL TERM.

The State of Florida, upon the relation of ALMON R. MEEK, who prosecutes in the name and by the authority of said State, vs. WILLIAM H. GLEASON, Lieutenant-Governor of the State of Florida—Information in the nature of “*quo warranto*.”

And now this day comes the said Attorney-General, who prosecutes in above-entitled cause in the name and by the authority of said State, and pursuant to leave of said Supreme Court this day given, amends the information heretofore filed by him in said cause, to wit, on the 8th day of November, 1868, by writing as a caption for said information the words, “In the name and by the authority of the State of Florida,” so that said information shall read, “In the name and by the authority of the State of Florida.”

ALMON R. MEEK, Attorney-General.

Whereupon the rule was enlarged until three o'clock of this said 12th day, and respondent given until that time to answer

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the same. Upon the arrival of that hour further time was granted until the fourteenth day of December, at ten o'clock A. M., to comply with said rule and to plead.

And afterwards, to wit: On the fourteenth day of December, in the year A. D. 1868, the respondent filed in the Clerk's office of this court his answer to the rule aforesaid, in the words and figures following, to wit:

IN THE SUPREME COURT OF FLORIDA, AT A SPECIAL TERM IN
DECEMBER, 1868.

The State of Florida, upon the relation of the Attorney-General,
vs. WILLIAM H. GLEASON, Lieutenant-Governor of the State
of Florida—Information in the nature of *quo warranto*.

The respondent, William H. Gleason, Lieutenant-Governor &c., protesting that this court has no jurisdiction to proceed further in this cause since he has filed his petition for its removal to the Circuit Court of the United States. Nevertheless, since this court has determined to proceed herein, overruled respondent's demurrer and granted leave to respondent to "show cause why final judgment of ouster should not be awarded against him," respondent shows cause as follows:

First. Because at the time of his election, stated in said information filed in this cause, he was not ineligible as in said information is alleged, and of this he puts himself upon the country.

Second. Because, if respondent was ineligible at the time of his election, it was for the people in the exercise of their sovereignty to determine whether they would elect him or not, and no Attorney-General, or other servant, officer, or agent of the people ought to be allowed to come into this court and ask it to undo that which the people themselves have done in their sovereign capacity.

Third. Because, supposing respondent to have been ineligible, the "award of a final judgment of ouster against him" would

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not conduce to the public good, nor be in accordance with the theory of our government; that the people are supreme, and the court are invested with a sound discretion as to whom they will “award a final judgment of ouster,” even though they may have the power to do so.

Fourth. Because the election and eligibility of respondent are purely political questions over which the electing power should be allowed to have exclusive control, and with which the Judicial Department of the government should have nothing to do.

Fifth. Because, though it should be conceded that respondent was ineligible at the time of his election, it is not pretended that he is not eligible now, so that if eligibility be all that is wanted, no one can be found more eligible than respondent.

Sixth. Because no one is contesting with respondent for the office of Lieutenant-Governor, and as respondent is the sole choice of the people, that choice should be respected.

Seventh. Because within less than a month from this date the Legislature of the State will be in session, and the Constitution having vested in that body the power to remove respondent from office, it would be best to leave the question connected with this cause for the consideration of that high tribunal.

Eighth. Because respondent was not elected under the provisions of the State Constitution, which had not then been adopted, but under the reconstruction acts of Congress and the orders of the Commanding General, and an ordinance of the Convention, neither of which prescribed any previous residence for them who should be elected at said election.

Ninth. Because, at the time of respondent's election, the government of the State of Florida was provisional only, and not a constitutional government.

Tenth. Because it was not intended by the makers of the Constitution that the persons voting or elected at the first election should be subject to the provisions of the Constitution; hence, though all were allowed to vote by the Constitution, all were not allowed to vote, but only those who could take a certain oath;

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and hence, also, though none by the Constitution could hold office except registered voters, yet in fact at the first election not one of those elected was a registered voter within the meaning of the Constitution, nor indeed could be, for the books of registration had not at that time been opened, nor officers appointed for that purpose.

Eleventh. Because respondent was eligible under the acts of Congress, and under the orders of the Commanding General, and the ordinance of the Constitutional Convention, under which he was elected, and the provisional State Government organized.

Twelfth. Because the government of the State of Florida was "provisional only," and subject entirely to the will of Congress and the Commanding General, until some time subsequent to the election and qualification of respondent as Lieutenant-Governor.

Thirteenth. Because Almon R. Meek, who files the information in this case, is not Attorney-General, as appears from a paper on file in this cause under the great seal of the State, and attested by the Secretary of State.

Fourteenth. Because if it be held that the residence of those who were appointed or elected to office at the first election, when the Government was provisional only, must be in accordance with the requirement of the Constitution, then the Chief Justice of this court was ineligible at the time of his appointment, he not having been a citizen of this State twelve months before his appointment, and not having been a registered voter at the time of his appointment, and therefore not capable of pronouncing judgment of ouster in this cause.

Fifteenth. Because, if during the provisional government of this State the requirements of the Constitution as to eligibility must be complied with, then Associate-Justice Hart is not a Judge, he not having been a registered voter at the time of his appointment, and not therefore eligible, and not capable of pronouncing a judgment of "ouster" in this cause.

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Sixteenth. Because this court has no original jurisdiction to award a final judgment of ouster in this cause.

Seventeenth. Because this cause cannot be decided without the intervention of a jury to determine the question of fact arising herein, and the Constitution and laws of this State have not clothed this court with power to empanel a jury.

Eighteenth. Because it is manifest, from the records in this cause, that this attempt to oust respondent from office is not because he is ineligible, but from some concealed motive, and this court should not lend itself to become the instrument of effecting the concealed purpose of any one.

Respondent having fully shown cause, prays to be hence dismissed, with his costs by him about his suit in this behalf expended.

W. H. GLEASON.

Sworn and subscribed before me this fourteenth day of December, 1868.

CHAS. KENMORE,

Deputy Clerk Supreme Court.

Upon filing which said answer respondent entered of record his motion in this cause in the words and figures as following, to wit:

The State of Florida on the relation of the Attorney-General vs.
W. H. GLEASON.

Respondent moves the court for a continuance of the further hearing of this cause till the next regular term of this court, on the ground of the absence of his counsel, Horatio Bisbee, who is in attendance on the United States District Court at Jacksonville, as stated in the affidavit of respondent this day filed herein.

Which motion was overruled and denied.

And upon the same day came the Attorney-General, and in behalf of the State of Florida, entered his certain motion in this behalf in the words and figures following, to wit:

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SUPREME COURT OF THE STATE OF FLORIDA, AT AN EXTRA AND SPECIAL TERM, DECEMBER 14TH, 1868.

The State of Florida, upon the relation of the Attorney-General of said State, who prosecutes in the name and by the authority of said State, vs. WILLIAM H. GLEASON, Lieutenant-Governor of said State—Information in the nature of a *quo warranto*.

And now comes the said Attorney-General, who prosecutes in the name and by the authority of said State, and moves the said Supreme Court to pronounce final judgment of ouster in said cause against the said respondent, said respondent having failed to plead to the information heretofore filed herein by said Attorney-General, or to show sufficient cause why said final judgment of ouster should not be awarded against him as required by the rule of said Supreme Court.

ALMON R. MEEK,
Attorney-General of the State of Florida.

After argument,

WESTCOTT, J., delivered the opinion of the court.

The principles of law involved in answers numbered respectively three, seven, thirteen, sixteen, and eighteen have been already considered, and the court sees no reason for repeating what it has said. The statement contained in the thirteenth, to the effect that it appears from a paper under the great seal of the State on file in this case, that Almon R. Meek is not Attorney-General, is incorrect. There is no such paper on file in the cause, and none has been offered in evidence during its progress.

The second and fourth grounds alleged are that the respondent was elected by the people of the State, and his eligibility is a political question not to be passed upon by the courts.

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This matter was not urged in argument, and we presume much force is not attached to it. The respondent was elected to an office created by the Constitution which the people had formed, and in framing it they restricted their own power in selecting their agents to administer the government so far as the office of Lieutenant-Governor is concerned, to a person who shall have been before his election to office three years a citizen of the State. Art. XVI., Sec. 22. Until this restriction upon their own power is removed in some legitimate and recognized legal method, it remains operative. The simple election of the respondent, whether with or without a knowledge of his ineligibility, cannot and does not operate to annul the constitutional requirements according to any known rule of law upon the subject, and such a proposition is no less than revolutionary in its character.

We cannot see that the question of eligibility is a political question in the sense intended by the fourth ground.

The distinction between questions which are political and such as are within judicial cognizance, is stated clearly in *Marbury vs. Madison*, 1st Cranch, 165; in 4th Wheaton, 400, and in 1st Ala., 704. In the light of these authorities, this answer is *insufficient*.

The fifth answer is to the effect that while respondent may not have been eligible when elected, he is so now. The Constitution requires that he "shall have been before his election to office three years a citizen of the State," and this court has, we conceive, no power to strike out the word "*before*" and insert the word "*after*" in the Constitution. Because no one is contesting the office is the sixth ground. This action is by the State, and its proper officer is inquiring by what warrant respondent is exercising one of the State's offices. It is never necessary that there should be a relator in such cases, nor that there should be a contestant. It is not proposed to determine here whether some person else is entitled to the office, but whether respondent is.

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The first portion of the tenth ground is considered with the eighth, ninth, eleventh, and twelfth as to the operation of the acts of Congress, the substance of it being that because there was a requirement to qualify voters under the reconstruction acts, and there was none under the Constitution, the matter of eligibility under the Constitution could not be inquired into.

The last portion of the tenth ground, and the matter of the fifteenth, is based upon the assumption that all officers are required by the Constitution, before they can become officers or discharge any duty, to be registered under a registration law which the Constitution makes it the duty of the Legislature to pass at its "first session after the ratification of the Constitution." The statement of the proposition is its own answer. With this view no Legislature could ever have passed the law, as no Governor could have been elected to approve it; there would have been no Government, because there could be no officers.

The fifteenth ground taken, based upon the idea just stated, while not in the form of a challenge made, is yet an objection questioning the powers of one of the justices of this court to act. See 1st Ark. Rep., 279; 4th Ark. Rep., 562; 1st Eng., 223. Passing and not considering whether the question is raised regularly, it is deemed proper to consider it to the extent it has been raised. It is certainly not possible for a party to stop the proceedings of a court by alleging any legal proposition absurd upon its face, as we believe this is. The purpose of this is other than it imports. It purports to be an answer to the rule. It is a reflection upon a member of the court under the form of pleadings. The clauses in the Constitution referred to are Sec. 6, Art. XIV., of the Constitution of this State, "The Legislature, at its first session after the ratification of this Constitution, shall by law provide for the registration by the clerk of the circuit court in each county, of all the legally qualified voters in such county, and for the returns of elections; and shall also provide that after the completion, from time to time,

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of such registration, no person not duly registered according to law shall be allowed to vote;" concluding clause of Sec. 22, Art. XVI., "No person shall be eligible to any office unless he be a registered voter." It is our opinion that the term "registered voter" here used, refers alone to the registration contemplated by the Constitution, and it could only be operative after the registration law was passed.

The objection made in the fourteenth to the eligibility of the Chief-Justice is considered by the other justices of the court. It alleges that he was ineligible at the time of his appointment. The court has at some length determined in a previous portion of this case that this question cannot be inquired into collaterally. It is not in the form of a challenge, and there is an evident distinction between this and an inquiry into the question of competency. A determination upon the competency of one of the members of a court tries no right, such as a right to office, and can be made without the formalities of process upon a statement of the facts touching the competency admitted by the officer. Judgments of courts amount to something or they should not be made. What would a judgment here amount to one way or the other? This is a question which can be determined only by a suit. Service is essential; without this and some mode recognized for a legal trial it cannot proceed. The court must waive process for the individual, hear his case without plea, or else postpone its consideration of the one now before it, until the Attorney-General sees proper to file an information, and it is determined, and if he never does it this is an end of the case. No right, such as this, can be determined effectually, without notice, trial by due course of law and judgment, and this cannot be done collaterally. *Davis Exparte*, 41st Maine, 58.

We now come to the consideration of the eighth, ninth, eleventh, and twelfth answers to the rule. Without at length quoting them they amount in substance to an allegation that respondent was not elected under the Constitution, but under

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certain acts of Congress, and an ordinance of the Constitutional Convention of the State, which prescribed no such citizenship as a qualification for his office, and that at the date of his election the government was provisional only. It will be noted that he does not claim to "*hold his office*" under these acts, but that he was simply elected under them. The election to an office, if elective in its character, is one of the requisites to the right of holding it, but it is not the only one. Where do we look for the others but to that instrument, to that fundamental law which creates it? Elections of representatives to Congress are held in the same sense under a proclamation of the Executive of a State, in obedience to a legislative enactment as to time and place. Do we look to these things, or to the Constitution of the United States, for their qualifications? It is true that according to these acts any government in this State, anterior to the one under which we obtained admission to representation in Congress, was provisional, and subject to be abolished; do these acts, however, so operate as to relieve the respondent from the operations of constitutional requirements as to eligibility for the office he holds, which was created by the Constitution framed under these acts, and which has been approved by Congress, and the Representative and Senators from the State admitted to Congress?

The enabling act places no such restrictions upon the power of the Convention which framed the Constitution, and it was as much within their power to prescribe qualifications for the office as it was to create it; the one is as clearly within their power as the other. The only legislation known to this country from which to draw an analogy here, is the enabling act of a Territory. Acts enabling Territories to form State governments have been very frequent in the history of the government, but it was never held that a party was free from constitutional requirements as to eligibility under the Constitution formed, because elections were held under the provisions of the enabling act, and ordinance of the Convention. If there was no power in the makers of the Constitution to prescribe qualifications for offices

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under the State government, not inconsistent with the conditions in the act of Congress, but in addition thereto, it is hard to perceive where they had the power to define the rights and functions of the officer, or indeed to ascertain what powers they did have, if any. If the Lieutenant-Governor of this State holds his office under the act of Congress, then he is an officer of the United States, and *his answers amount to a plea of disclaimer*, and a judgment should be awarded. We have authority or jurisdiction to inquire into the title of an office under the Constitution of this State, but none as to offices of the United States. We do not see that there is any necessity to examine or construe the act of Congress. We think it is only necessary to know that the office in question is created by the State Constitution; here is respondent's title deed, and by this alone must it be tried.

These answers to the rule are insufficient.

The only remaining causes assigned not considered, are the first and seventeenth.

The first is: "Because at the time of his election, as stated in said information filed in this cause, he was not ineligible as in said information is alleged, and of this he puts himself upon the country."

This comes in such questionable shape that it cannot be strictly called a plea, and in an ordinary case it would be stricken out, if for no other reason than that it is included in what purports to be an answer to the rule, while properly it should have been filed separately as a plea. The rule was in the alternative to plead, or to show cause, &c., and whatever was the proper subject of plea should have been made so, apart from the answer. What does this amount to, and is it such a plea as requires a reply or demurrer; or can issue be required to be joined? It is the statement of a legal conclusion from facts which are not set forth, or brought to the attention of the court, to wit: That the respondent was not ineligible as in said information is alleged; and as in the information it is alleged that he was ineligible to the office of Lieutenant-Governor, the result

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is, that it is simply a statement of a conclusion, the facts upon which it is based being kept out of the plea in such manner that a demurrer cannot reach them. An issue joined would result, as is apparent, in respondent attempting to prove that he was eligible to the office of Lieutenant-Governor under the reconstruction acts. This was the basis of his general allegation that he was not ineligible as in said information is alleged, namely, ineligible to the office of Lieutenant-Governor, because he was elected under the reconstruction acts. All of this is mere sophistry. The court has passed upon these questions; the respondent must plead facts, such as are responsive to the information, viz.: That he was three years a citizen, &c. No demurrer can reach this question under this plea, no issue can be taken upon a proposition of law. The plea should set out the defendant's title at length, and the rule as to the replication even in this character of actions is, that it cannot take issue on the general traverse "without this, that he usurped," &c., but should be to the special matter, that the defendant may know how to apply his defense. *Rex. vs. Blagdon, Gibbs, Rep., 145.* The defendant must either justify or disclaim; and not guilty, or *non usurpavit*, are not good pleas, for they do not answer to the nature of the charge, which is to show by what warrant or authority. *Bull. N. P., 211.* The defendant must show title in himself. *Com. Dig. Quo. Warr., C. 4; 9th Coke, 24.*

In the State of Ohio vs. Beecher, 15 Ohio, 725, the plea was that "he was legally appointed, qualified, and entered upon the duties of the office, and that he has ever since held and exercised the same, as he had the legal right to do." The court say, "the authorities require of him to set out all the facts necessary to constitute a good title specifically to hold the office," and the plea was not good.

In general a plaintiff proves his claim or demand; not so here with the State. The defendant must set up and must show that he has a good title. The State is only to answer his particular claim. He must at once show a complete title. If he fails.

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judgment must be given against him. He cannot say he was duly elected in general terms. *Rex vs. Leigh*, 4th Burrow 2, 143. See also as to requisites of the plea. *Rex vs. Birch*, 4 T. R., 608; 2 East., 75; *Bullers, N. P.*, 211; 6 Dane. Ab., 360; *Cole on Informations*, 148, 149.

The State is entitled to judgment, and the motion of the Attorney-General should be granted according to the strict rules of practice; but the court is unwilling to deny the respondent the opportunity of setting up a defense, if he has any. He shall be given every opportunity, and further time until three o'clock P. M. of this day, the 14th December, 1868, is allowed him to file an issuable plea framed in accordance with the requirements of law. Such a plea not being filed, it will announce its judgment at that hour.

The seventeenth ground alleged is as follows: "Because this cause cannot be decided without the intervention of a jury to determine the question of fact arising herein, and the Constitution and laws of this State have not clothed this court with power to empanel a jury." The authorities already cited show that a judgment follows a default in pleading in this class of cases. The State has to prove no title, but calls upon the citizen to show his. Until issues of fact are raised, this question cannot arise, and the court does not propose to decide it until it does arise. The respondent can claim no jury until he tenders an issue of fact; when that is done the proper determination will be made and the question considered.

The judgment of the court upon the matter of this answer to the rule, and the motion of the Attorney-General, is:

It is considered by the court that the grounds set up in answer to the rule, numbered respectively from two to eighteen inclusive, are insufficient, and are overruled.

It is further considered that the first ground set up, which to some extent partakes of the character of a plea, is insufficient in that it tenders an issue of law, and is otherwise inadmissible in this action, and the court allows the respondent until three

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o'clock this afternoon to file an issuable plea setting up matters of fact responsive to the information, the court also taking time to consider whether the first ground taken by the respondent, in which he places himself upon the country, which the court considers insufficient, shall require a demurrer, or shall be overruled and set aside as insufficient.

And afterwards, to wit: At three o'clock in the afternoon of the fifteenth day of December, A. D. 1868, the respondent having failed to plead, the following judgment was entered:

The court, after considering the question reserved as to the first ground presented by respondent to the rule, adjudge that the same is insufficient as a plea, and doth overrule the same, and the respondent having failed to file any plea as authorized and required by the court, it is now, on motion of the said Attorney-General of said State in this behalf for final judgment of ouster, considered by the court that the said William H. Gleason do not in any manner intermeddle, or concern himself in and about the holding of, or exercising the said office of Lieutenant-Governor of the State of Florida in said information specified, but the said William H. Gleason be absolutely prejudged and excluded from holding or exercising the said office, and that the said State of Florida do recover costs to be taxed by the Clerk in this behalf. And the court imposes no fine in this behalf.

The respondent claiming the right to prosecute a writ of error from the Supreme Court of the United States in this case, filed such writ, issued by the Clerk of the Circuit Court of the United States, with the clerk of this court, and prayed that a citation might be signed by the Chief-Justice of this court in accordance with the provisions of the act of Congress.

RANDALL, C. J., declining to sign the citation, delivered the following opinion:

This suit was commenced in this court and prosecuted by the

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Attorney-General of the State of Florida, and final judgment rendered on the fifteenth day of December, A. D. eighteen hundred and sixty-eight, ousting the respondent, William H. Gleason, from the office of Lieutenant-Governor of said State, the said respondent having appeared herein and having failed to plead to the information filed by the Attorney-General, or to show legal cause why judgment should not be rendered against him.

The respondent now seeking to obtain a review and reversal of said judgment by the Supreme Court of the United States by writ of error, has applied to the Chief-Justice of the Supreme Court of the State of Florida to sign the citation.

This the respondent is entitled to have done, if the case is one of those mentioned in the twenty-fifth section of the act of Congress passed September twenty-fourth, seventeen hundred and eighty-nine, relating to writs of error; but if the case is not one of that class, then the respondent is not entitled to the review sought, and I have no legal authority to sign the citation, and if signed it would be of no effect.

The Constitution of this State requires that the Governor and Lieutenant-Governor shall have been "three years a citizen of the State of Florida, next preceding the time of his election." Art. V., Sec. 3 and Sec. 14.

The information charges that at the time of his election the respondent had not been a citizen of the State for three years and therefore is not entitled to hold the office.

Under an order to plead or to show cause why judgment of ouster should not be rendered against him, the respondent, by way of showing cause, alleged that he was elected to said office in May, 1868, at the same time that an election was held under the reconstruction acts of Congress, upon the question of the adoption of the Constitution; that the election at the same time for State officers was held in pursuance of an ordinance of the Constitutional Convention and the reconstruction acts, and an order of the Commanding General of this Military District;

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that he was then elected Lieutenant-Governor; and because the government formed upon the adoption of the Constitution was "*provisional only*," and the constitutional requirement as to eligibility not being in force at the time the election was held, the Constitution not yet being adopted, that he was eligible to said office *under the said acts of Congress*.

The respondent was sworn into office in July, A. D. 1868, after the passage of the act of Congress admitting the States of Georgia, Florida, and other hitherto disorganized States to representation in Congress, and after the Commanding-General had surrendered the government of this State into the hands of Governor Reed, who had been sworn into office on the 8th day of June, when the Legislature met and organized. The election was held for the purpose of filling the offices created and provided for in and by the Constitution. The duties of those officers so elected were provided and prescribed in the Constitution. The persons elected could hold the offices provided in the instrument, and no others. Their right to hold the offices depended upon the adoption of the Constitution which was offered for the acceptance of the people at the same election. They were elected to hold such offices as they might be permitted to hold by the terms of the Constitution. They are thereby required to take an oath of office, in which they must swear that they are "entitled to hold office under this Constitution." It permitted certain persons to hold office, and prohibited certain other persons from so doing. Its provisions became operative (so far as it was possible to become so without legislation) the moment it was adopted by the people, and endorsed by Congress. If its prohibitions in one respect were inoperative, they were equally inoperative in other respects, except where legislation was contemplated to give them effect. It is demanded in effect that we should give such a construction to the law as that the qualifications of the officers first elected were prescribed by the reconstruction acts; but it is shown that these acts only contained a single restrictive provision, and that by the terms of the acts themselves they ceased

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to have any operation the moment the State Constitution was infused with the breath of life.

The Supreme Court, in deciding that the cause shown why judgment of ouster should not be rendered, was insufficient, determined that the right to hold the office depended upon the qualifications prescribed in the fundamental law under which the respondent claimed to hold, and without which fundamental law the office itself did not exist. By failing to assert his right to the office in the only manner known to the law, a judgment of ouster was rendered, and in rendering such judgment it is not yet discovered in what particular there is "drawn in question the validity of any treaty, or of any statute of, or an authority exercised under the United States, or that the decision is against the validity" of either; nor in what particular "is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and that the decision is in favor of such their validity;" nor in what particular "is drawn in question the *construction* of any clause of the Constitution, or of a treaty, or statute of, or commission *held under the United States*, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party under such clause of the said Constitution, treaty, statute, or commission." For the respondent does not "claim" that he *holds* the office under any clause of the Constitution or any statute of the United States, such being offices of the United States, and not offices of this State. He claims to hold a State office on the ground that the laws of Congress *did not prohibit him* from holding it, and seeks to ignore the constitutional requisites.

The Supreme Court has not denied his right, title, or privilege under an act of Congress, nor questioned his right to hold any office conferred upon him thereunder; but the court has denied his right to *hold* the office of Lieutenant-Governor under the provisions of the Constitution of this State, not conflicting

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in anywise with any act of Congress, treaty, or provision of the Constitution of the United States, it being conceded that he was elected to the office in question; but as it stands confessed of record that he was not eligible to *fill* the office under the Constitution of this State, the court could not otherwise decide.

The Supreme Court of the United States holds as follows: It is sufficient if it appears from the record that an act of Congress was applicable to the case and was misconstrued, or the decision in the State court was against the privilege or exemption specially set up under *such* a statute, to bring the case within the provisions of the 25th section of the act. 6 Peters, 48.

It must be shown on the record that such a question did arise and was applied by the State court. 10 Peters, 369.

The only question is, whether the record shows that the Constitution or treaty, or a law of the United States has been violated by the decision of the court. 9 Peters, 224.

It is sufficient to bring the case within the provisions of the act, if the record shows that the Constitution or laws of the United States must have been misconstrued, or the decision could not have been made. 2 Peters, 245, 380; 3 do., 302.

As I do not conceive that any question has arisen in this case, or been decided by the Supreme Court of this State, within the purview of the act of Congress, I cannot sign the citation.

E. M. RANDALL,

Chief-Justice Supreme Court Florida.

December 16th, 1868.

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EX PARTE WILLIAM NIGHTINGALE—UPON HABEAS CORPUS

1. A prosecution for crime must be conducted in the name and by the authority of the State of Florida.

2. A judgment authorized by a statute which creates the debt upon which it is based, and which is entered in favor of a person whose suit or demand the defendant has not summoned to answer, is void.

The opinion of the court contains a statement of the case.

C. W. Jones, for Petitioner.

C. C. Yonge, for Sheriff.

WESTCOTT, J., delivered the opinion of the court.

The petitioner, William Nightingale, having filed his petition with one of the justices of this court alleging that he was detained in custody without lawful authority by George E. Wentworth, sheriff of Escambia county, a writ of *habeas corpus* was granted returnable to this term. The writ has been returned and “the cause of the detainer of the prisoner” as certified by the sheriff, in an order of the judge of the county court of Escambia county in the words following:

Commissioners of Pilotage of the Port of Pensacola vs. WILLIAM NIGHTINGALE—Fraud.

This case coming on for examination, the accused, William Nightingale, came into court in the custody of the sheriff, and was thereupon arraigned and pleaded not guilty as charged in the commitment.

Whereupon the court, after hearing the evidence and argument of counsel does consider and order that the accused, William Nightingale, be held upon his recognizance in the sum of

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five hundred dollars to appear at the next term of this court, in default of which he be committed to jail.

Accompanying this return is a transcript of the record of the proceedings of the county court. This record, and an affidavit disclosing the fact that petitioner was a foreigner, being filed, the case was submitted upon this evidence after argument.

From this record it appears that the petitioner was charged before the Board of Pilot Commissioners of Pensacola with a violation of the act entitled "An Act authorizing the Board of Commissioners of Pilotage to appoint Stevedores, and for other purposes," approved July 31, 1868.

The first section of this act authorizes the Board of Pilot Commissioners to grant commissions and licenses to such number of competent and trustworthy persons as they may deem necessary after examination.

The second section provides the time for which they shall hold their office, and requires a bond.

The third section provides that "no person shall receive a commission as stevedore, or exercise the duties of a stevedore, unless he is a citizen of the United States and of the State of Florida, nor shall any person be allowed to contract for the loading of any vessel or vessels in any of the ports or harbors of this State, unless so commissioned and licensed, and any person found violating the intent and meaning of this act, shall be guilty of a fraud, and shall be adjudged to be *indebted* to the Board of Commissioners of Pilotage in the sum of three hundred dollars, and the court shall enter judgment therefor, with costs, in favor of said Board of Commissioners of Pilotage, and if such judgment shall not be paid within ten days after judgment is entered, during which time the accused shall remain in custody, execution may be issued therefor commanding the sheriff to levy the amount thereof out of the property of the person against whom such judgment was rendered, and if sufficient property cannot be found to satisfy the same, then to take his

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body and him safely keep in the county jail of said county until said judgment and costs be paid.” The other sections provide that in case the judgment is paid, one half shall go to the informer; that neither the State nor county shall be responsible for costs; that upon complaint upon oath charging a violation of the act, an arrest and examination shall follow, and such offense appearing to have been committed, a commitment in default of bail shall issue, and that the county court shall have jurisdiction to try all cases arising under the act, which shall be conducted in the same manner as trials for misdemeanors.

It appears that the petitioner not having been commissioned or licensed as a stevedore in and for the port of Pensacola, was charged with having contracted for the loading of the British barque Conway, then in port, and with being then engaged in loading the said barque, contrary to the intent and meaning of the act referred to.

An inspection of the record discloses that after the charge was made to the pilot commissioners, these proceedings were instituted in the county court by them, and that the prosecution was conducted in the name of the Board of Commissioners of Pilotage of Pensacola.

This is expressly in conflict with the 2d Sec. of Art. VI. of the Constitution of this State, which requires that “all prosecutions shall be conducted in the name and by the authority of the State of Florida.”

This clause, which is to be found in most if not all of the Constitutions of the States which took part in the formation of the government, was inserted to exclude the idea that any other, either local authority or foreign power, should exercise this authority of prosecuting for crimes under State laws. It was to assert the sovereignty and supremacy of the State in matters of this kind.

In the case now before us, this authority is assumed by the Board of Pilot Commissioners, the prosecution is expressly in their name, and to recognize it as constitutional would be tanta—

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mount to constructing an *imperium in imperio*, and to vest in this board a power which the people by the Constitution have expressly confided alone to the "State of Florida." 5 Howard, Miss., 5; 2 Bibb., 210.

The provision that "any person found violating the intent and meaning of this act shall be guilty of a fraud, and shall be adjudged to be indebted to the Board of Commissioners of Pilotage in the sum of three hundred dollars, and the court shall enter judgment therefor, with costs, in favor of said Board of Commissioners of Pilotage," construed with reference to the other sections, must fix the character of this very strange law. What is the meaning of the clause "shall be guilty of a fraud"? It is unusual in a statute to provide that a party having done certain acts shall be guilty of a larceny, or other crime. The use of the article *a* in such a connection, would indicate the purpose of the Legislature to create a new class of crimes, of which this defined here was to be the first. If we would give the clause the same signification which we would if the word felony or misdemeanor stood in the place of the word fraud, such must be the necessary effect of the language. Gross frauds and cheats were punishable at common law, but no such distinct crime was known as "fraud."

The Constitution of this State classifies crimes under the heads of felonies and misdemeanors, in granting power to the several courts to be organized under it. Their jurisdiction is defined and limited with reference to these heads of crime; no jurisdiction is provided for a new class of crimes to be called "frauds," instead of felonies or misdemeanors, and looking at this statute in this view the question arises, can the Legislature create a new class of crimes to be called frauds, and the courts take jurisdiction under such a legislative grant of power?

The county court shall have "jurisdiction of all misdemeanors," and the circuit court "jurisdiction in all criminal cases amounting to felony," is the language of the Constitution. This may be a strange view to take of the statute, but it is a

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statute *sui generis*, and we desire to look at it in every aspect.

Another view to be taken of this statute, and this was, perhaps, the intention of the Legislature, is that the word "fraud," as here used, indicates a new crime to be known as "fraud," which consists of contracting to load a vessel without a license as stevedore, and that it is a felony or misdemeanor, as its nature and incidents shall indicate.

Under this construction, the statute first creates a new crime which is a misdemeanor, that must be prosecuted in the name of the State as a misdemeanor, and the trial "conducted according to the provisions of law relating to the trial of misdemeanors." The result of conviction is that the party guilty of the fraud shall be adjudged *indebted* to the Board of Commissioners of Pilotage in the sum of three hundred dollars, and the court shall enter judgment for the debt of the party to the Board of Pilot Commissioners in favor of the board, and shall award costs incurred in a prosecution by the State to them.

Thus we have, in the first place, a criminal prosecution on the part of the State resulting in creating a debt not mentioned or alluded to in the prosecution in favor of the Board of Pilot Commissioners, a third party whose suit or demand the prisoner has never been summoned to answer, and in the second place, upon this debt thus being established, the court, without any further process of law or notice, awards a judgment in favor of this third party for the debt thus arbitrarily established, as well as for costs incurred in a prosecution by the State of Florida against him, to which this board is no party.

In 2 Fla., 112, it is held that "where consequences in violation of common reason, common right, and the principles of common justice arise even collaterally out of a statute, it is void *pro tanto*;" and this doctrine, if correct, might well be invoked here, for such results are certainly contrary to common sense, reason, and justice. We need not resort to this doctrine, however.

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If the debt can thus be established (upon which we express no opinion), it cannot be thus reduced to judgment. This can only be done after notice and trial, and the Legislature, even admitting for the sake of argument that it can arbitrarily create a debt as distinct from a penalty, fine, or forfeiture, cannot arbitrarily enact that a debt of A to B shall be a judgment. We know of no such power in the government. In the expressive language of an eminent jurist, 'that is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than any attribute of government.' 4 Harris, 206.

This act, under a still different construction, might be held to be a penal statute, and the three hundred dollars a forfeiture of penalty to be recovered by the commissioners in an action of debt upon the statute, if its provisions did not indicate that there was to be a criminal trial, as in cases of misdemeanor, and the result of conviction, the establishment of a debt, and immediately a judgment in favor of a third party.

In this aspect another question would arise, viz: whether the Board of Pilot Commissioners could recover the penalty or forfeiture in the face of the constitutional requirement that "all fines collected under the penal laws of this State," shall go to the common school fund. Sec. 4, Art. VIII.

The matter arising upon the petition, and the return of the sheriff to the writ of *habeas corpus* issue therein, having been argued by counsel for the petitioner, as well as by counsel for the return, and it appearing that there is not sufficient legal warrant for the arrest and detention of the prisoner shown in the return of the sheriff, and no other or further cause for his detention being shown, it is ordered that the said William Nightingale be discharged from said imprisonment, and that he go hence without day.

The State of Florida vs. William Kirke—Syllabus.

STATE OF FLORIDA *ex. rel.* J. DENNIS WOLFE vs. WILLIAM KIRKE, JUDGE OF THE COUNTY COURT OF ESCAMBIA COUNTY.

1. Courts by common law had no power to admit an attorney or counsellor to practice.
2. Courts by common law had the power to disbar attorneys after demand the defendant has not been summoned to answer, is void.
3. The statutes of this State regulating the admission of attorneys do not affect the power of courts to disbar an attorney. Such power is essential to the maintenance of their own dignity and the respectability of their officers.
4. Where it is intended to apply to the courts to have an attorney disbarred, the proper course of proceeding is to present the charge to the court, and it will direct a rule to show cause why the name of the attorney should not be stricken from the roll, if a case proper for the action of the court be presented; this rule is awarded, served, and returned, and the court hears and determines the matter according to law.
5. A regular complaint against an attorney ought not to be received and acted on unless made on oath, and the charge made should be specific and particular, so that the officer may be aware of the precise nature of the accusation he is to meet.
6. The county courts of this State have the power to disbar an attorney and to deny him the rights of an officer of that court, but their judgment cannot extend beyond a denial of the privileges of an attorney in that court. It does not directly affect his rights in other courts.
7. While it is essential that the authority of the courts should remain unimpaired in the exercise of this great and peculiar power, it is not the less so that the rights of the officer should be protected against a wrongful exercise of it, and this court will interpose when the inferior court has decided erroneously on the testimony, and a plain case of wrong and injustice is brought to its attention.
8. The appropriate remedy in a case of this character is by a writ of mandamus, rather than an appeal from the order of the inferior court, or writ of error.

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Mandamus to judge of the county court of Escambia county.
The facts are fully stated in the opinion.

A. J. Peeler for the Relator.

A. C. Blount for Respondent.

WESTCOTT, J., delivered the opinion of the court.

This case arises out of an order of the county court of Escambia county, striking the name of J. Dennis Wolfe, an attorney of that court, from its roll of attorneys, and depriving him of the rights and privileges of an attorney of that court.

Upon the filing of a transcript of the record of the judgment of the county court containing the evidence there introduced, and a petition praying an alternative writ of mandamus, this court, after inspection, granted the prayer of the petition, and awarded an alternative writ of mandamus directed to the judge of the county court. The judge of the county court has made his return to the alternative writ in the words following:

“That he claims the right, as judge of the county court of Escambia county, upon the facts apparent upon the record accompanying the petition in this case, to disbar the said J. Dennis Wolfe from practicing as an attorney-at-law in his court, and he admits that he has caused the name of the said Wolfe as attorney as aforesaid to be stricken from the roll of attorneys of his said court, as stated in said petition.”

To this return a demurrer is filed, and joinder in demurrer.

The grounds of the demurrer are two:

First. “That the respondent, as judge of the county court of Escambia county, had not the power or authority by law to disbar the relator, or to strike his name from the roll of attorneys of his court, or to refuse him the rights and privileges of an attorney therein.”

The right of the petitioner to practice as an attorney in the

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county court is not derived from any order or proceeding in that court. The law regulating the subject (Thompson's Dig., 322, 333,) provides: "It shall be the duty of any person wishing to obtain a license to practice law in the courts of this State, to present to one of the judges of the circuit court satisfactory evidence of good moral character, and that he is twenty-one years of age, whereupon the judge shall examine into the qualifications of the applicant, and if found qualified he shall grant him license to practice in the several courts of this State.

* * * * *

"No person shall be permitted to appear as an attorney and counsellor-at-law in any cause in the courts of this State, until he shall have produced to the court in which he proposes to practice, a license signed by one of the circuit courts, or a certificate under the hand and seal of a clerk of some one of the circuit courts of the United States, of his having been admitted to practice in said circuit court, which license or certificate shall be entered upon the minutes of the court in which the said attorney wishes to practice, and the original returned by the clerk to said attorney."

It will be thus seen that the right to practice in the county court results from the grant of a license to practice in the several courts of this State by a judge of one of the circuit courts of this State, and that upon the production of a license so signed it is required that he shall be permitted to appear as an attorney and counsellor-at-law in any of the courts of this State. The petitioner having been so admitted by a judge of the circuit court, and having taken the necessary steps to become entitled to practice in the county court, contends that there is no power in the county court to prohibit him from practicing in that court. That the right to practice in the county court does not emanate from any power which it has over the admission of attorneys is plain; that the judge of the county court has no authority to deny admission as an attorney of that court to one who exhibits 'a license to practice in the several courts of

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this State granted in conformity to law," is clear, but does it follow that because the admission of the party to practice does not result from any exercise of power by the county court, that after such admission the county court cannot, after due process of law, deny the party so admitted the rights of an attorney of that court for good cause? Does not the grant of the license to practice in the several courts by the circuit court, operate simply to entitle him to the privilege of an attorney in the several courts without further examination, and does he not, after such admission, become subject to be denied the right to practice before that court? These questions involve an inquiry into the effect of the statute.

What was the law independent of the statute? At common law the courts had no power to admit attorneys or counsellors, and it has been held that for this reason this is a power not inherent in a court, and in the absence of constitutional provisions a matter for regulation by the Legislative Department of the Government. It cannot be claimed as a part of the inherent power of courts, or as resulting necessarily from any power which they have. Indeed, barristers or counsellors-at-law in England were never even appointed by the courts, but were called to the bar by the Inns of Court, which were associations not vested with even corporate powers, nor could the courts control the discretion of the Inns of Court as to whom they would call. In England the power of the courts to appoint attorneys has been from time to time regulated by statute. There were some acts anterior to that date, but the act which gave shape to the matter, and became a model, was the act of 4 Hen. IV., chapter 18, which, among other things, provided "that all attorneys should be examined by the justices, and by their discretion their names shall be put upon the roll," and the matter has been further controlled and regulated by subsequent statutes. 3 Jas. I., ch. 7; 6 and 7 Vict., ch. 73; 20 and 21 Vict., chap. 77.

In some of the American colonies the power of appointing attorneys was exercised by the Governor of the colony, who

usually took advice from the Chief-Justice of the Supreme Court.

Before the statutes above-mentioned, which regulated the subject and gave the courts the power to examine and admit attorneys, the courts would not suffer suitors to have an attorney, because the words of the writ were to command the defendant to appear, and that was always taken to be in proper person. At common law all parties had to appear in person. Attorneys, anterior to the statutes, could only be had by those who had permission of the King, and such attorneys were simply attorneys in fact. It was the custom of the King to direct his writs to the judges, commanding them to receive such persons by their attorney, and the judges were bound so to do. Fitz Herbert's Report, 59.

In New York, by statute, persons upon whom the degree of Bachelor of Laws has been conferred by the Law School of Columbia are entitled, without any further examination, to practice in the courts of that State, and the Supreme Court against its opinion of the

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the common law did not provide. This being done, the statute we are construing gives us the remedy, "and it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy." Co. Litt., 11, 42; 1 Black, 87.

We are of opinion that the mischief here was the want of common law power in the courts to admit attorneys, and that the Legislature, in the exercise of a power which it possessed beyond question, proposed by this act to place the control of the subject of admission in the courts; that the circuit courts being courts of general jurisdiction this power was vested in them. There is nothing in the language of the act, or in the common law evil that it was to remedy, which in any manner justifies the idea that its purpose or effect was to do anything more than to provide a power in the circuit courts to "grant licenses to practice law," upon the exhibition of which, signed by one of the judges, it should be recorded by the other court upon its minutes, &c.

The statute of Westminster first, 3 Ed., 1 chap., 29, which was before there was any recognized class of practitioners as attorneys, provided "that if any sergeant, counter, or other, do any matter of deceit or collusion in the King's Court, or consent to it, to deceive or entrap the court or one of the parties, he shall be no more heard in the court to plead for any one." Lord Coke says these practices "were against the common law, and therefore this act was made in affirmance of the common law." 2 Ins., 213, 214.

And it is clear that even counsellors who were neither officers of any court nor invested with any judicial office, but barely practiced as counsellors, were subject to be controlled by this power of the courts. 2 Reeves Hist., 126; 1 Hawk., P. C., ch. 27, page 461; 3 Burr, 1256.

The power to punish as well by imprisonment as by prohibiting parties from practicing, was a power incident to courts; existed before there was any recognized class of attorneys, and

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when in fact no roll of attorneys existed, for the first roll was introduced by 4 Hen. IV., ch. 18.

That courts have had and exercised a summary jurisdiction of this character over their attorneys, cases from the earliest period to the present time establish. 4 Moore, 171; 7 Moore, 376; Hawkins, P. C., 369; 1st Yerg., 238; 48 Ind., 49.

Justice Nelson, in the very recent case of *Ex parte Joseph H. Bradley*, says: "We do not doubt the power of the court to punish attorneys for misbehavior in the practice of the profession. This power has been exercised and recognized ever since the organization of courts." This was said in reference to the disbarring of an attorney, the matter then under investigation. The right of the courts to exercise this power existed before they controlled the subject of admission. One was a common law power, the other a power derived from statute. The rule applicable to the construction of statutes is, that an act in derogation of the common law is to be construed strictly. In this case, however, we do not think that the statute has anything to do with the power of the courts over an attorney after he has been admitted. It does not propose to affect it, and no principle of construction need be invoked. It was urged at bar that the county court was not such a court as possessed this power, and that to admit its power to this extent is to admit its power to control the Circuit and Supreme Courts in the matter. Each court possesses this power as a necessary incident to its organization. The county court having disbarred an attorney does not affect his right to practice in the other courts, and if he has been admitted in the County and Supreme Courts, and has become entitled to the rights of an officer there, the action of the circuit court can only affect his right to practice in that court; because the power to admit is one thing, and the power to disbar another. The one is confined to the circuit courts, the other is possessed by the County and Supreme and Circuit Court.

The case in 1 Johnson's cases, 183, cited by petitioner, was in an inferior court, and the Court of Errors in New York, in re-

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viewing the decision of the Court of Common Pleas, say: "By the Constitution of this State the power of appointing attorneys was transferred to the respective courts. The Constitution did no more, however, than to transfer or vest in the courts the power of appointment which had before been possessed by the Governor of the Colony. The expression that they should be governed by the rules and orders of the court, *gives no additional authority over them, and they would have been equally subject to those rules and orders if the Constitution had been silent in this respect.*" The court further say that it takes jurisdiction of the case upon the ground that it has "the power of correcting any abuse or injustice of inferior courts towards their officers."

The fact that a removal by the Court of Common Pleas, under the statutes of New York, would have operated to prevent his admission to practice in the Supreme Court, was one of the matters which the court urged as a reason for its exercise of its general superintending power; but the court does not sustain the idea that a removal by the Common Pleas would operate to remove from the other courts. The statute would not permit any other State court to admit the party to practice, if another State court had before his application disbarred him.

In 1 Cal., 190, the application was for an alternative writ of mandamus, and the matter appears to have received but little attention. The court in this case say: "The proceedings in the court below are irregular, and inasmuch as the relators have received from this court a license to practice as attorneys at law in the Supreme Court, and by the rules of court are authorized by virtue thereof to practice in all the courts of this State, we are called upon to afford relief."

As we understand the opinion, the "irregularity" in the proceedings was the ground of their interference, and not the opinion that the action of the court below could directly affect the standing of the attorney in the Supreme Court. As to this point, the Supreme Court of California bases its views upon the single authority in 1 Johnson's cases, which we have be-

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fore commented upon, and which we have seen lays down the rule to be that the Court of Common Pleas in New York, though an inferior court, possessed, independent of statutory authority, the power to disbar.

Whether the county court is an inferior court of *limited jurisdiction*, within the meaning of the authorities upon that subject, we do not determine. It may be remarked, however, that it is by statute declared a court of record, with general powers to carry out its jurisdiction; that its system of pleading and practice, in other than probate and criminal matters, is similar to that of the circuit court, and that under the Constitution it has a considerable jurisdiction.

We have found no authority which would sustain the position, that a court with the jurisdiction and power of the county court did not possess this power, and none has been cited at bar.

We are of the opinion that there is no want of power in the county court, in a proper case, and upon proper proceedings, to disbar one of its attorneys.

It remains to consider the second ground of demurrer, which is "That the record which accompanies relator's petition, upon which respondent relies in his return as justification for the disbarment of the relator shows no sufficient cause in law or in fact for disbarring the relator or striking his name from the roll of attorneys of the county court of Escambia county, or refusing him the rights and privileges of an attorney at law thereon."

We do not doubt our power to exercise control over inferior courts in matters of this character in certain cases, nor that the manner of proceeding in this case is correctly conceived. 1 John. cases, 181; Ex parte Burr., 9 Wheat., 530; Tapping on Mand., 14, 45; Hurst's case, 1 Lev., 75; Leigh's case, 3 Mod., 335; White's case, 6 Mod., 18; 4 Bac. Ab., 501; 3 Salk., 230; 2 Tomlin's Law Dic., 514; Ex parte Jos. H. Bradley, lately decided in Sup. Ct. U. S.

In some of the States the remedy has been by appeal from

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the judgment of the court below, (see these cases reviewed in 22 N. Yk. Rpts., Ct. of Appeals, 68,) but we think that the question is settled by the late decision of the Supreme Court of the United States, in the case of *Ex parte Joseph H. Bradley*, where *mandamus* was adopted and sustained. Say the court, in *Ex parte Bradley*: "This writ is applicable only in the supervision of the proceedings of inferior courts, in cases where there is a legal right without any existing legal remedy. It is upon this ground that the remedy has been applied from an early day, indeed since the organization of courts and admission of attorneys to practice therein down to the present time, to correct the abuses of inferior courts in summary proceedings against their officers, and especially against the attorneys and counsellors of the courts. The order disbarring them, or subjecting them to fine and imprisonment, is *not reviewable by writ of error*, it not being a judgment in the sense of the law for which this writ will lie. Without, therefore, the use of the writ of *mandamus*, however flagrant the wrong committed against these officers, they would be destitute of any redress. The attorney or counsellor disbarred from caprice, prejudice, or passion, and thus suddenly deprived of the only means of an honorable support of himself and family, upon the contrary doctrine contended for, would be utterly remediless." Nor have inferior courts an unlimited discretion in such matters, for if it be exercised with manifest injustice there is a remedy. *Tapping on Mand.*, 14.

It must be a sound discretion and according to law. 19 Howard, 13; 9 Wheat., 530; *Ex parte J. H. Bradley*.

In the case of *Ex parte Secombe* and *Ex parte Jos. H. Bradley* there is apparently a conflict in the views of the court.

In *Ex parte Jos. H. Bradley* the court say: "The order disbarring them (attorneys) or subjecting them to fine and imprisonment, is not reviewable by writ of error." In *Ex parte Secombe* the court, when reviewing an order of similar character, say: "It is not necessary to inquire whether this decision of the territorial court can be reviewed here in any other form of pro-

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ceeding. But the court are of opinion that he is not entitled to a remedy by mandamus. Undoubtedly the judgments of an inferior court may be reversed in a superior one which possesses appellate power over it, and a mandate may be issued commanding it to carry into execution the judgment of the appellate tribunal. But it cannot be reviewed and reversed in this form of proceeding, however, erroneous it may be or supposed to be."

Again, in *Ex Parte Secombe*, which was a case in which the attorney was disbarred for what was alleged to be a contempt in open court, without notice or hearing, and during his absence, the court say: "These principles (those above stated denying the remedy by mandamus) apply with equal force to the proceedings adopted by the court in making the removal;" that is to say, that mandamus is not the remedy to correct and set aside such irregularity, or to relieve the attorney from its consequences;" while in the very recent case of *Ex Parte Bradley* it is said: "The proceeding is admitted to be the recognized remedy when the case is outside of the exercise of this discretion;" that is, as we understand it, a sound discretion, "and is one of irregularity or against law, or of flagrant injustice, or without jurisdiction." Chief-Justice Taney, in *Ex parte Secombe* speaking of the exercise of discretion says: "The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself."

From a review of the English and American cases on this subject, we are of opinion that if the evidence in this case discloses that gross injustices or wrong has been done, this is the only remedy, and it should be administered. The matter charged here is not for any contempt in the presence of the

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Court, nor is there any fine or sentence of imprisonment resulting from contempt.

Under the Constitution of this State, the power of this court, with reference to inferior tribunals, is much like that of the Court of King's Bench in England. 2 Caine's Cases in Error, 309; State of Fla.; *ex rel* Att'y Gen. vs. W. H. Gleason, 12 Fla. Repts.

Its jurisdiction is more extensive than that of the Supreme Court of the United States in respect to writs of this character. In the Supreme Court of the United States they can be used only as incidents to appellate jurisdiction. Here they are writs which appertain to the original jurisdiction of this court, and they can be made available when they are the proper remedies.

"Writs of mandamus are granted in England to restore officers in corporations, colleges, &c., unjustly turned out, and freemen wrongfully disfranchised." 2 Tomlin's Law Dic., 372.

It is also the remedy "to restore an attorney in an inferior court, for the office of an attorney is necessary to the administration of justice, and is of a public concern." Hurst's case, 1 Lev., 75; Leigh's case, 3 Mod., 333; White's case, 6 Mod., 18.

So to restore a school-master. Parkinson's case, Comb., 144.

So to restore one to the stewardship of a court. Stamp's case, 2 Lev., 18.

So to restore a clerk of the peace. Rex vs. Owen, Comb., 317.

So to restore the register of a bishop's court. Anon Comb., 264.

If it be true, as held by the Supreme Court of the United States, that a writ of error does not lie to an order disbarring an attorney, then to deny the remedy by mandamus is to make the office of an attorney one entirely dependent upon the pleasure of inferior courts; for if a writ of error cannot be prosecuted in that court, it cannot be under our statute here. We have been able to find no case in which the broad proposition that an inferior court can, though it conform to the proper rules of

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practice, without cause disbar an attorney, and there is *no remedy*, is sustained. And if there is no remedy by writ of error (under the statute) a refusal here to grant relief if it be a case of hardship and plain wrong upon the testimony, would be to establish, without any controlling precedent in point a rule both iniquitous and unjust in the extreme; making a large and most respectable class of persons, who have given their lives to their profession, subject to be deprived of a right, in this State conferred by statute, at the pleasure of inferior courts, from “passion, prejudice, or personal hostility,” without any means of redress.

An attorney's rights in the county court result, in this State, from statute. When admitted as an officer of the court, the rights and the incidents to his position are not held *durante bene placito*. He cannot be said to hold his rights, privileges, or franchises at the absolute will and pleasure of each court in which the statute authorizes him to practice. Under the laws of New York, the possession by a graduate of the Law School of Columbia College of a diploma conferring the degree of Bachelor of Laws, entitled a party, being of proper age to admission to practice. H. W. Cooper presented this evidence of his qualifications, which gave him, under the statute, a right of admission, and it was denied by the Supreme Court. An appeal was taken to the Court of Appeals. Comstock, C. J., and Justices Denio and Wright held that an appeal could not be taken from such an order, and Seldon, who delivered the opinion of the Court, (the Chief-Justice and Justices Denio and Wright dissenting), sustained the appeal only on the ground that the statute regulating appeals gave the Court of Appeals “jurisdiction to review every actual determination in a final order affecting a substantial right, made in a special proceeding;” the court holding that it was a special proceeding. We have no similar statute here, and it is not clearly seen how this order or judgment could be brought here or to the circuit court by appeal or writ of error under our Constitution and laws. See also 1 Peck, 292.

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One of the offices of a mandamus, which is founded upon *Magna Charta*, is to restrain *excesses* of inferior tribunals, and it is issued to inferior courts to enforce the *due exercise* of those judicial or ministerial powers with which they are invested. It is in its nature a writ of restitution. 3 Black. Comm., 111, 265. Tapping on Mandamus, 105, 5, 199; Bac. Abridg't, title Mandamus, let. D, page 273, let. E, page 278; 3 Steph. N. P., 2292; 5 Peters, 190; 9 Wheat., 521; Ex parte J. H. Bradley.

In *Rex vs. Barker*, 3 Burr., 1265, Lord Mansfield said: "Where there is a right to execute an office or exercise a franchise, and a person is dispossessed of such *right*, and has *no other* specific legal remedy, this court ought to assist by mandamus, upon reasons of *justice*, as the writ expresses—*Nos, A. B., debitam et festinam justitiam 'in hac parte fieri volentes ut est justum,'* and upon reasons of public policy to preserve peace, order, and good government. A mandamus is a prerogative writ, to the aid of which the subject is entitled upon a proper case previously shown to the satisfaction of the court. It was introduced to prevent disorder from a failure of justice. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. The value of the matter or the degree of its importance to the public policy is not scrupulously weighed. If there be a *right*, and no other *specific remedy*, *this* should not be denied. *Writs of mandamus have been granted to restore an attorney to practice in an inferior court.*" (The italics in the last sentence are made by this court.)

In 5 Wendell, 114, speaking of the jurisdiction, the court says: "The jurisdiction of this court, by mandamus, is one of immense importance and extent. It extends to all inferior courts and tribunals;" and in speaking of controlling their discretion, it is said, "the security of the citizen is essentially increased whenever the territory of undefined discretion is circumscribed by the establishment of well-defined and clear principles."

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The Supreme Court of Massachusetts in 1851, 7 Cush., 239 when in argument it was insisted that the writ could not be claimed as a right, said: "The application is to the discretion of the court; but this is not an arbitrary discretion, it is a judicial discretion; and when there is a right and the law has established no *specific remedy*, this writ should not be denied. This writ was granted only to prevent a failure of justice, and is no doubt more freely and frequently granted at the present time than it was formerly."

The court, in 4 Hill, 583, say: "The mandamus is a prerogative writ which we have power to *issue or withhold, according to our discretion.*"

In this State, the *right* of an attorney to practice in the county court is a legal right resulting from statute. "His office of an attorney is necessary to the administration of justice, and is of public concern," as was remarked in White's case, 6 Mod., 18; and when "dispossessed of such right has no other specific legal remedy" but mandamus, and if, even upon the facts alone, a case of plain wrong is presented, we will correct it when the act is by an inferior court. There is no case which, while denying a remedy by writ of error, also denies a remedy by mandamus, and there is no good reason why the discretion of inferior courts in respect to their officers should not be controlled in matters of this kind.

While, as a general rule, a discretion will not be controlled by mandamus, yet it is going too far to say, as many of the courts have, without full examination, that there have not been able courts both in England and the United States that have done so, in cases where there is much less reason for exercising this power than in cases of this kind, where often the discretion would be made the vehicle for the satisfaction of personal ill-feeling; though we do not intend to say that such was the case here.

Lord Ellenborough, Chief-Justice, in the King vs. the Justices of Wiltshire, 10 East., 406, A. D., 1808, said: "The magistrates certainly had a discretion to exercise with respect to what was

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reasonable time for giving the notice of appeal, and we think that in this case they have not exercised that discretion in a way that we ought to give effect to, but that we ought to interfere and correct it;" and a peremptory mandamus was awarded, directing them to enter continuances. In *Rex vs. the Commissioners of the Flockwood Enclosure*, 2 Chitty, 325, A. D. 1819, it was held that "in a motion for mandamus the court will not grant the writ where discretion was given to the commissioners, and no ground be shown that they have done it wrongfully."

The purpose of the motion was to effect an exchange of lands, which was a matter of discretion with the commissioners, and the Chief-Justice took particular notice of the fact that equality of interest or value was not shown.

In *The King vs. The Justices of Lancashire*, 7 D. & R., 692, where an appeal against an order of removal was dismissed on the ground that the appellant had not given the notice required by the rules of the justices, the court, thinking it reasonable that the appeal should be heard, granted a mandamus to the justices to enter continuances and hear the appeal. See also 3 B. & Ad., 704; 5 *ibid.*, 671; 3 D., 310, 311.

Tapping on Mandamus, the ablest elementary writer on the subject, states the rule to be, "that the court will not interfere with the discretion of an inferior jurisdiction when it is exercised in accordance with reasonable rules of practice. It must, however, be clearly understood, that although there may be a discretionary power, yet if it be exercised *with manifest injustice*, the court is not precluded from commanding its due exercise; *the jurisdiction* under such circumstances being clearly established." Tapping on Mand., 14, 199; 3 B. & Ad., 704; 10 East., 404; 7 B. & C., 692; 3 Black., 265.

Taking the State of New York as an illustration of the practice and views of the American courts, we find in 1 Cowen, 15, it was insisted by the attorney that the granting a rule to set aside a *fi. fa.* was matter of discretion, and having been passed upon could not be opened. The Court of Errors directed the

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inferior court, upon mandamus, to vacate and set aside the rule.

In 2 Cowen, 483, which was a motion for a mandamus to an inferior court, commanding them to grant a new trial, the court say, as to the remedy by mandamus, it may be proper to remark, that though in extreme cases we might interfere and control the court below upon questions of fact presented in the form of a motion for a new trial, yet it is a remedy which should be used very sparingly.

In 5 Wendell, 114, mandamus was granted to vacate a rule granting a new trial, where the matter was considered fully and discussed elaborately. In 18 Wendell, 103, the court hold that there is no *jurisdiction* by mandamus to control a discretion, after elaborate and full examination, the opinion of the court being delivered by the President of the Senate; but it is to be noticed in this case, that Chancellor Walworth remarked: "It is not necessary to the decision of this case that I should examine the *question of jurisdiction*, and I should prefer to delay a decision thereon until it could be more fully argued than was done in the present case." In 20 Wendell, 658, the rule laid down in the last case stated, was sustained and affirmed, except that it was here held "that ministerial officers and corporations may be required by this writ to act in a particular manner, or even to reverse what they have already done."

In this State it has been refused to control such discretion as is possessed by executive officers in auditing accounts; among other reasons, because it would be an indirect method of suing the State. 3 Fla., 202. It is hardly necessary to say that this is a very different case from that one at bar. These officers belong to a different department of the government.

In the case in 1 Johnson's cases, 182, before cited, which was a case precisely similar to this, the court say: "Two questions are made: 1 Whether the charges exhibited were supported by the proofs; 2. Whether the Court of Common Pleas possessed the exclusive power of determining on the conduct of its own

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officers, or whether this court could interfere. As to the first, the court say: "We are of opinion that the affidavits do not sufficiently support the charge of malconduct, but are rather to be considered as evidence of mistake than of intentional error. At least the ground of removal was too slight for a punishment so severe." As to the second point, the court held that they did have "the power of correcting any abuse or injustice of inferior courts towards their officers."

The *jurisdiction* we do not doubt; the power is clear. The granting of the writ, however, is a matter to be exercised *with a sound discretion*, and we may refuse if we see proper; nor is the writ a matter of *right* to the petitioner; and the general rule is, without doubt, that matters of discretion or conclusions of fact will not be thus controlled. The Legislative Department of this State has expressed its opinion to the effect that the orders and judgments of the circuit courts of the State, depending on their uncontrolled discretion, should be reviewable in the Supreme Court. (Chap. 521, Laws of Fla.) This case, however, is not embraced in that law, and it is only referred to here to show the view of the Legislative Department of the government as to the propriety of reviewing discretion of this character. While the jurisdiction and power is unquestioned in certain cases, and the means here sought to make that power operative is correct, yet it must be a plain case of wrong to induce this court to control an inferior court in the exercise of a power which is essential to the maintenance of its own dignity and the respectability of its officers.

The proceedings in this case are irregular in several respects.

First, a rule to show cause is awarded before any proper ground is laid. It appears from the record that the judge awarded a rule to show cause why the name of the attorney should not be stricken from the roll of attorneys of the county court, "for conduct unbecoming an officer of the court, in representing himself as an attorney in a matter for the purpose of influencing the same, when in truth and in fact he was not such attorney."

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It appears that A. C. Blount made oath that he believed that the matter set forth in the "above rule" was true, and hence, so far as it appears from the record, there was no ground laid for the rule before it was issued. It is unusual for any party to swear to the truth of facts set up in the process of courts; whatever facts are alleged as the basis of its action by the court are its own deductions from what has been previously laid before it or has come within its judicial view. In this case the court seems to have acted without either.

Second. It does not appear that the rule was served, or that service was expressly waived, or that the rule was made returnable at any certain day. It does appear, though, that the petitioner was present at the taking of the evidence, and was heard in his defense, and we are inclined to think that this cures this defect. Where it is intended to apply to the court to have an attorney disbarred, the proper course of proceeding is to present the evidence relied on to the court, and it will direct a rule to show cause to be entered, if a case proper for the action of the court be presented. This rule is served and returned, and the court hears and determines the case according to law. *In Re John Percy*, 36 N. Y'k Repts; 22 Wendell, 656; 1st Yerg., 229.

A regular complaint against an attorney, says Chief-Justice Marshall, ought not to be received and acted on unless made on oath. 9 Wheat., 529. It has been held by some of the courts that the charge made must be specific and particular, so that the officer may be aware of the precise nature of the charge he is to meet; and we think this is the correct rule. 3 Green's Rept's, 551.

This is a summary proceeding, involving the professional character of the party, and the result of which, if adverse to him, deprives him, *pro tanto*, of the vocation from which the support of himself and his family is derived. We have no like proceedings to deny a merchant the right to vend his goods or the farmer to cultivate his farm, and while it is essential that the

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power of the courts should remain unimpaired in the exercise of this great and peculiar function, it is not the less so that the right of the officer should be protected. We think that the precise "matter" in which he represented himself as an attorney falsely should have been set forth. It remains to consider the facts of this case as disclosed by the record.

From the evidence and the record it would seem that the charge was intended to be, that the attorney falsely represented to James Abercombie that he was the attorney of one B. C. Bennett, authorized to represent him in certain business matters connected with the Alabama and Florida Railroad not yet adjusted between Abercombie and Bennett, Abercombie being the president of the Railroad Company, as well as certain other matters of business existing between them. It appears that on the 18th of August, Bennett had written to Wolfe requesting him, as one of the "city fathers" of Pensacola, to use his influence in securing the repayment to him, Bennett, of certain moneys, which he had nine months before loaned. In this letter to Wolfe he writes: "I intend to start North in a few days, just as soon as I am able to travel. C. C. Coles, of this place, will be my agent during my absence. He is a gentleman and a responsible man. If you wish to communicate with me you will address B. C. Bennett, Whistler, Alabama. I will leave my papers with Mr. Coles." It appears from the record that Wolfe wrote a reply to this letter, and that Bennett received it before he left. Its contents, however, are not disclosed, except so far as they may be inferred from the following letter written by Coles, the agent of Bennett, under Bennett's instructions, on the 28th of August, 1868, which Wolfe received:

"WHISTLER, Mobile County, Ala., Aug. 28, 1868.

J. DENNIS WOLFE, ESQ.:

Dear Sir: Your favor of the 25th came duly to hand a few hours before Mr. Bennett left for the North. *He desires me to reply.* You will find inclosed a copy of receipts against certain

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parties in your city. I would earnestly request you to give them your earliest attention, as Mr. Bennett will require all the money that he can get to pay his debts, and he expects me to receive the money from Pensacola to enable me to satisfy the demands against him. Hoping to hear from you soon I will close, and remain,

Respectfully yours,

C. C. COLES,

For B. C. Bennett."

"P. S.—In addition to the amounts inclosed, Mr. Bennett informed me that he advanced to Mess. Abercombie and Ruter the sum of four hundred and seventy-five dollars as follows: four hundred of it was paid more than a year ago, and the balance sent them from Mobile last February or March. He also said that he loaned A. B. Blount thirty dollars on the 25th day of March, 1868. You will please see the above parties, and, if possible, have all the accounts settled up as soon as possible.

Yours,

C. C. C."

In this letter was inclosed one receipt of James Abercombie as President of the Alabama and Florida Railroad Company to one R. M. Ruter for the sum of one hundred and seventy-five dollars, received to pay expenses connected with proceedings in bankruptcy by the Company, and which was to be returned from the assets of the Company, which receipt had been transferred by Ruter to Bennett. There were also two receipts of James Abercombie, president of the road, for sums to be applied to the case in bankruptcy and returned from its assets, one of which was for the sum of three hundred dollars, the other for seventy-five dollars. There were also other receipts of Wolfe and Blount to Ruter and Bennett for moneys received with which it would appear from the record that Abercombie had some connection. It will be noted that the authorized agent of Bennett, in this letter to Wolfe, whose business was that of practicing attorney, instructed him as follows: "In addition to the amounts inclosed *Mr. Bennett* informed me that he advance

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to Messrs. Abercombie & Ruter the sum of four hundred and seventy-five dollars." "He also said that he loaned A. C. Blount thirty dollars on the 25th day of March, A. D. 1868. You will please see the above parties, and if possible have all the accounts settled up as soon as possible."

This is written by Mr. Bennett's agent, and is a postscript to a letter which the agent says he wrote at the "desire" of Bennett. The instruction is positive: "You will see the above parties, and if possible have *all the accounts settled up as soon as possible.*" After receiving both of these letters, and on the 17th of September, A. D. 1868, Wolfe writes to Abercombie a respectful letter in which occurs the following passage: "Mr. Bennett, whose attorney I am, desires me to say to you that he is desirous that a speedy adjustment of the matter between you and him may be made." Mr. Wolfe was a practicing attorney, and it was his business to attend to such matters in no other capacity, so far as this record discloses; and his conclusion that he was so desired to act is entirely justified by these letters. These letters show clearly what was the foundation for Wolfe's letter to Abercombie. The other evidence in the record discloses nothing that could *have influenced Wolfe's conduct* or affected his *conclusions from these letters*, and the true question which the court below should have considered was, Did these letters justify the conclusion to which Wolfe came? viz.: that he was to act as Bennett's attorney, and even had he made a mistake in his conclusion, yet if there was reasonable ground for such apprehension, the court would not have been warranted, under the circumstances, in making the judgment it did.

The evidence which was introduced to sustain the charge was a letter of Bennett to Abercombie, dated Nov. 17, 1868, in which he stated in effect that he did not constitute Wolfe his attorney in the matters referred to, "with instructions to demand of Abercombie a speedy settlement of the money transactions" he had had with him. Strictly speaking, Bennett may not have done so in person, but his agent, who mhe described to Wolfe as "a

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gentleman and a responsible man," did give these instructions substantially, in a letter written at his desire; and unless Bennett made this statement in view of this distinction, or in view of a difference in the precise words used by him and those by his agent, he either misrepresented the character of his agent or made a grave mistake himself in his letter to Abercombie. So far as the fact that these charges were preferred by a brother member of the profession is concerned, it is highly commendable, if the motive was good and there appeared to be good cause. In this case, if Bennett's letter to Abercombie was all that was seen, it would naturally create the presumption of bad conduct. It is the duty of members of the bar to institute proceedings to disbar one that brings discredit upon the profession by highly improper conduct.

Without passing upon the question made at bar that the alleged misconduct must have been when "acting as an officer of the county court, or in some suit, matter, or proceeding therein, or in which that court had jurisdiction, we are satisfied that the case is plain upon the testimony, and comes within the rule as enunciated by Chief-Justice Marshall in *Ex parte Burr*, 9 Wheat., 529, which is, as we understand it, that this court can properly interpose when the county court has decided erroneously on the testimony, and its conduct is manifestly improper.

Our conclusion is, that a peremptory mandamus must issue.

SARAH A. FRISBEE AND JAMES JOHNSON, ADMINISTRATOR OF
JAMES T. FRISBEE, DECEASED, vs. HENRY TIMANUS.

1. Where an action of ejectment has been tried in a State Court, and a verdict and judgment rendered therein, and a writ of *certiorari* issued improvidently at the instance of the falling party out of the Circuit Court of the United States, in obedience to which the record has been certified by the State Court into the United States Court, and the State Court to prevent a conflict suspends execution of the judgment, the party against whom



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The judgment was rendered being in possession, and in receipt of the rents of the premises in controversy, and being irresponsible, a State Court of Chancery may appoint a receiver to collect and hold the rents and profits of the premises until the final determination of the proceedings in the United States Court.

2. In such case, a demurrer to a bill, (filed for the purpose of procuring the appointment of a receiver,) on the ground that the "subject matter of the controversy" is pending in the United States Court, will not be sustained.

3. This court will not set aside a decree for the purpose of enabling a party to answer who was duly served with process, and had ample opportunity to answer a bill, but neglected to do so before a decree *pro confesso* was entered, and made no attempt to file an answer before final decree.

4. The appointment of a receiver is a matter resting in the sound discretion of a Court of Equity, and a receiver is treated as the representative or agent of the court, and subject to its orders. He is appointed to secure the benefits of such persons as shall be entitled, and the proceeding does not affect the rights of parties on the subject matter.

Appeal from the Circuit Court of Nassau county.

Balling Baker and *R. M. Smith* for Appellants.

J. P. Sanderson for Appellee.

A statement of the case is found in the opinion of the court.

RANDALL, C. J., delivered the opinion of the court:

On the 23d day of September, 1867, Henry Timanus, appellee, filed his bill of complaint against Sarah A. Frisbee and James Johnson, as administrators of the estate of James T. Frisbee, deceased, and also against other persons as tenants of certain property in question. The bill alleges that the complainant is the owner in fee simple of certain lands and tenements in the city of Fernandina, known as lots 1 and 34 in block 10, having become the owner by purchase from the trustees of the Florida Railroad Company, in January, 1860, and as owner is entitled to the possession and rents and profits thereof.

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That the defendants, Sarah A. Frisbee and James Johnson, as administrators, &c., or in their own right as representatives or heirs of James T. Frisbee, deceased, claim to own said property and to be entitled to the possession thereof, and to draw and receive the rents and profits thereof, by reason of a certain tax title derived by said James T. Frisbee, deceased, in his life time, at a tax sale made by the United States Direct Tax Commissioners of Florida, in June, 1863, and December, 1864. That said Frisbee and Johnson are and have been ever since the first of April, 1867, in possession, and have leased said lots and premises to the other defendants named, and are receiving a large amount of rents and profits therefor. And that the defendants, Frisbee and Johnson, wrongfully, illegally, and fraudulently keep the possession of the premises from complainant, and wrongfully, &c., draw the rents from the other defendants; because that during the life time of said James T. Frisbee, deceased, complainant had brought a suit at law against him in the circuit court of Nassau county to recover possession of said premises, in which suit said Frisbee appeared and set up and brought into issue his said tax titles, and their validity was tried, and they were by a jury adjudged to be void, and of no binding force or effect, and the verdict and judgment of said jury and court were in favor of the complainant, to wit: that said Frisbee was guilty of unlawfully withholding said premises from complainant, and that complainant was entitled to hold and possess the same. That said verdict and judgment were had and obtained on the 22d day of December, A. D. 1866.

That said Frisbee, after said trial and judgment, petitioned the Circuit Court of the United States for the Northern District of Florida for the removal of said cause into that court by a writ of *certiorari*, which writ was duly issued and served, and the clerk of said Nassau Circuit Court, in compliance with the command of said writ, sent all the papers and proceedings in the case to the said Circuit Court of the United States.

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And the complainant alleges that such proceeding was not warranted by law, and was an invention and contrivance to keep up a perplexing system of litigation for the purpose of keeping possession of said premises, and to enjoy the rents therefor. That said James T. Frisbee died about the first of April, 1857, and since then these defendants are continuing such fraudulent inventions in pretending to prosecute the removal of said cause, for the sole purpose of drawing and raising a large amount of rents and profits. That said Sarah A. Frisbee and James Johnson are both irresponsible persons; that they, as administrators, are not good and responsible for the moneys so received from complainant's said property; that the sureties upon their bonds as such administrators are also without adequate means, and irresponsible persons; and that if they were responsible they would not be liable to pay money obtained by the aforesaid frauds of said Frisbee and Johnson.

That by such fraudulent contrivance and invention of a lengthy litigation, complainant had no proper or immediate remedy or relief. That there was no judge of the United States Circuit Court, and it would be a long time before he could again have possession of his property. That said Frisbee and Johnson have, for the purpose of obtaining a large amount of ready money out of said rents in advance, rented out said premises for less than they are worth. That the lots are covered with wooden buildings for stores and offices, and have for a long time been without repairs, and are greatly damaged by the neglect of such repairs by said Frisbee and Johnson. Complainant has demanded possession, which has been refused, and has demanded rents from the tenants, the other defendants, and notified them not to pay rents to the said Frisbee and Johnson; but they give no heed thereto, but continue to pay such rents to them. All which actings and doings are alleged to be in violation of law, and contrary to equity and good conscience. Complainant demands a disclosure from the said Frisbee and Johnson of the facts, and of the amounts received for rents, &c.

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prays an injunction against defendants, and that a receiver be appointed to take charge of said premises, and receive the rents and profits. That said Frisbee and Johnson pay over to said receiver all the rents, &c., already received, &c., and for other and further relief. A preliminary injunction was issued, and a receiver appointed pursuant to the prayer of the bill.

In November, 1867, the defendants Frisbee and Johnson demurred to said bill on the ground that this court had no jurisdiction of the subject-matter; that the United States Circuit Court has the sole and proper jurisdiction thereof; that all suits and papers relating to the title to said premises were removed by *certiorari* to said United States Circuit Court, and all further proceedings in this court had been ordered to be discontinued, whereby said United States Circuit Court had taken cognizance and possessed full and complete jurisdiction of the whole subject-matter, and was fully competent to administer full and complete relief in the premises, both in law and equity; wherefore defendants demur to all the matters and things contained in the bill, and pray whether they shall be compelled to make further or other answer.

The demurrer was subsequently overruled, and a decree was entered on the 30th January, 1868, the defendants having failed to answer. And the decree, after reciting certain matters as having been established by the bill, exhibits proof and receiver's report, finds that the said defendants, Frisbee and Johnson, have received the sum of \$726.66 rents and profits from complainant's premises, and that the other defendants owed certain amounts for such rents as aforesaid, &c. "And the court further finds that the writ of *certiorari* from the United States Circuit Court, removing the ejectment suit referred to in complainant's bill, has been dismissed, and the cause remanded back to this court, and that on the date of January 18th, 1868, the complainant was put in possession of the premises referred to by the sheriff of this county, under a writ at law, and the receiver's report having been approved by the court, it is therefore ordered, ad-

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judged, and decreed, that the defendants, Sarah A. Frisbee and James Johnson, do pay the sum of \$726.66, in default of which an order be issued to the sheriff of this county to make the money out of the goods, chattels, and property of said defendants as in cases of execution;" * * and that the defendants pay the costs to be taxed, and that execution issue, &c.

The rules of this court distinctly require that the appellant file with the transcript of the record a petition of appeal, in which the grounds upon which a reversal of the decree is placed shall be distinctly and plainly set forth, and counsel are confined to the matters so stated and set forth in the argument of the cause. No such petition of appeal having been filed, the respective counsel in argument confined themselves to the ground upon which an appeal was prayed, viz.:

1. That the demurrer filed should have been sustained, and the case dismissed for want of jurisdiction, as the matter in controversy had been and was litigated in the United States Court for the Fifth Judicial Circuit, for the Northern District of Florida.

II The decree *pro confesso* should not have been confirmed for want of plea or answer, for the reason that the order remanding the said action of ejectment to the State court was not put on file in the clerk's office of Nassau county until January 18th, 1868, and the decree confirmed January 30th, 1868, thereby giving the defendants no proper time for answering.

III. The court erred in granting said decree or judgment for \$726.66 against said defendants, for the reason that said defendants were entitled to the use and possession of said property in controversy by virtue of an act of Congress entitled "An Act for the Collection of Direct Taxes in Insurrectionary Districts," approved June 7th, 1862, and the amendments thereto.

IV. The court never obtained proper jurisdiction of the matters in controversy, and therefore all orders, judgments, and decrees made by the court in said action should be set aside.

The first and fourth grounds, arising upon the demurrer, are considered together.

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When a court acts without jurisdiction, such acts are void, and may be treated as nullities, or set aside. It is claimed that after the service of the writ of *certiorari*, and the filing of the record and proceedings in the action of ejectment in the Circuit Court of the United States, all right and jurisdiction of the State courts in relation to the subject-matter of the ejectment suit ceased, the Federal court having entire jurisdiction and control thereof. If the proposition had any force whatever in its application to the present case, it would seem to be a two-edged instrument. The record shows that the Federal court remanded the ejectment suit to the State court, and doubtless dismissed its writ of *certiorari* upon the ground of the want of jurisdiction in that court. The ground is not distinctly stated, but as we know of no law authorizing the removal of this action of ejectment from the State court to the United States court by *certiorari*, we presume the defendants had mistaken their rights, and that the suit was attempted to be removed into and prosecuted in the United States Circuit Court, either improvidently or for some of the reasons alleged by the complainant in his bill.

But the question of conflict of jurisdiction does not arise in this case. The suit commenced in the Nassau Circuit Court was ejectment, and the plaintiff's title to the premises in question was put in issue and a verdict rendered, and judgment in his favor entered and signed, after which the writ of *certiorari* issuing from the Federal court was served upon the clerk of the State court, who made return thereto, transmitting the whole record to the United States court. The State court, out of comity, did not assume to act upon its own judgment duly entered, but delayed action toward the enforcement thereof until the Federal court had decided upon its own jurisdiction, dismissed the case from its consideration, and remanded the record to the State court. The subject-matter of that suit was the title to the premises in question. The subject-matter of this suit is the rents and profits accruing during the time in which the record so remained in the United States court, and from the time of the appointment of the

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defendants, Frisbee and Johnson, as administrators of the defendant in the ejectment suit, and after trial and judgment in the State court.

The present suit, therefore, did not involve any question which it was within the province of a court of law to determine. The complainant alleges that he is the owner of the premises, and has recovered a judgment upon his title against the defendant in ejectment. That the acts of the said defendant placed it out of his power to enjoy the fruits of his judgment, viz., the use, rents, and profits of the premises; that the defendants in this suit are the legal representatives of the said defendant, James T. Frisbee; that they are receiving such rents and profits, and are irresponsible, and that the complainant is not secured by reason of the irresponsibility also of the securities of the defendants as administratrix and administrator; that they are reducing the rents in order to get advance payment thereof from the tenants; that the property in the meantime is becoming dilapidated; that the defendants are not keeping it in repair; that there was no Judge of the Circuit Court of the United States in office; that the said proceedings of the defendant, James T. Frisbee, in the matter of said *certiorari*, were not warranted by law, and were an invention and contrivance to keep up a perplexing system of litigation for the purpose of keeping possession of the premises and enjoying the rents and profits thereof, and that these defendants are continuing the same conduct for the same purposes; that they have so realized large amounts of money for the use of his premises, and being without remedy in a court of law, he brings this bill, praying an injunction against the said defendants to restrain them from further collecting such rents, and that a receiver be appointed to receive such rents, and profits, and hold the same subject to the order of the court.

It is difficult to see how these things could have been accomplished by the proceedings in ejectment, even had the Circuit Court of the United States entertained and proceeded with that suit. The defendants by their demurrer, and by their failure to

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answer these allegations of the complainant's bill, confess to be true. It seems to be one of those cases in which the proceedings on the part of the complainant are not only warranted but necessary for his protection. The circumstances require that the rents and profits of the premises in controversy should be held by some indifferent person, under security until the matter should be settled, and the rights of the respective parties to the rents and profits thereby established, to the end that he should be allowed to enjoy them if he established his right. The appointment of a receiver is a matter resting in the sound discretion of the court, and when appointed is treated as the representative or agent of the court, and subject to its orders. 9 Vesey,

Lord Hardwicke considered this power of appointment to be of great importance, and most beneficial tendency, and said, "It is discretionary power exercised by the court, with as great utility to the subject as any authority which belongs to it, and is provisional only for the more speedy getting in of a party's estate, and securing it for the benefit of such persons who shall appear to be entitled, and *does not affect the right.*" 3 Atk.,

This case, as made by the bill, is one coming within the class in which a court of equity will interpose for the protection of parties whose interests are jeopardized, and should be protected where there is no adequate remedy at law. The circumstances are somewhat peculiar, and perhaps the precise case is without direct precedent in the reports, but the principle may be properly applied. See *Jones vs. Jones*, 3 Merivale, 174, where the court says it "has in several instances appointed a receiver of personal estate pending a suit in the Ecclesiastical Court."

The demurrer, therefore, was very properly overruled.

The second point made is, that the order remanding the ejectment suit to the Nassau Circuit Court was not filed therein until the 18th of January, 1868, and that the final decree being entered on the 30th January, the "defendant had no proper time for answering." According to the view we have taken of the case, the proceedings in this suit and in the ejectment suit

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independent, and there were at no time any obstacles in the way of the defendants answering this bill before a decree according to the practice of the courts; nor does it appear that an application was made to the court, after the decree *pro confesso* was entered, for leave to file an answer. The neglect of a party to assert his rights does not ordinarily entitle him to favor.

Upon the third ground, the defendants say the court erred in granting a decree for \$726.66 against them, for the reason that the defendants were entitled to the use and possession of the premises in question by virtue of an act of Congress entitled "An Act for the Collection of Direct Taxes in Insurrectionary Districts," and the amendments thereto.

It is true, the complainant in his bill states that the defendants, Frisbee and Johnson, claim to own and to be entitled to the possession of the premises under a tax sale by the Direct Tax Commissioners to James T. Frisbee, deceased, and are in possession by virtue of said tax sale, and that in virtue thereof they are receiving the rents, &c.; and that the ejectment suit brought into issue their rights under said tax sale. But the validity of their claim under said sale could not well have been brought into issue in this suit. It is not shown or claimed that the said sum of money so decreed to be paid was more than the complainant was entitled to, or that there was any irregularity in the proceedings by which the amount was ascertained, if indeed they were authorized to question the regularity of such proceedings after the decree *pro confesso* was entered. "The defendant will not be heard upon matters occurring subsequent to the default." *Megin vs. Filor et al.*, IV. Fla., 203; *Betton vs. Williams*, *ib.*, 14.

The final decree in this case must therefore be affirmed, and the cause remanded for further proceedings in accordance with that decree, and the practice of the court.

Daniel R. June vs. Thomas J. Myers—Opinion of Court.

DANIEL R. JUNE vs. THOMAS J. MYERS.

1. When a bill is filed, and a cause is at issue, and the nature of the case requires a statement of account by a master, and the master in his report simply recapitulates immaterial portions of the testimony, without stating an account, no decree can be based upon such report.

2. Where the appellate court cannot determine from the report of a master or from the evidence in the case the basis upon which the decree was made, the decree will be reversed.

Appeal from decree of the Circuit Court sitting for Alachua county.

A statement of the case is contained in the opinion.

S. Spencer, for Appellant.

Banks and Banks, for Appellee.

RANDALL, C. J., delivered the opinion of the court:

Thomas J. Myers, complainant, (respondent,) filed his bill of complaint against the appellant in the Circuit Court of Alachua county, and alleges, that in February or March, 1861, he left his home in said county, and left this State, leaving in possession of the appellant three negro slaves, the property of the complainant, with the express understanding and agreement that they were to work as laborers upon the plantation of the appellant, or be employed in clearing lands, and in such other ways as the appellant might direct, the complainant to receive for their services an equal share per hand of the entire gross crop grown upon the plantation of the appellant, the appellant paying all expenses, &c.; and that said slaves labored continuously and without intermission under the direction of the appellant, from February or March, 1861, to the first of May, 1865, and that ap-

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Appellant has failed and refused to account for said services as per agreement between them.

Complainant further alleges that he likewise left in the possession and custody of appellant at the same time, a number of notes, amounting in value to two hundred and fifty dollars, or some other large amount, which he has refused to account for, either by returning the notes or paying over the money, if any, realized therefrom. And that at the same time he left on appellant's plantation one bay stallion horse, worth four hundred dollars, and he is informed and believes that appellant sold said horse without complainant's permission, and has failed and refused to account therefor. And that, at the same time, he left in the custody and possession of appellant a quantity of household furniture, clothing, baggage, &c., of the value of one hundred dollars, and likewise a number of medical and miscellaneous books, of the value of one hundred dollars, for which appellant has failed and refused to account.

That in February or March, 1861, he gave to the appellant a power of attorney authorizing him to rent or sell the plantation of complainant in said county, and that appellant rented said plantation during the years 1861 to 1865, to different individuals, for large amounts of money or for a portion of the crops, and that he has absolutely failed and refused to account for the same.

That in January, 1866, he endeavored upon sundry occasions to have an amicable settlement of all matters at issue between the parties and that appellant has absolutely failed and refused so to do; and complainant prays that appellant may be required to account to him for the property left in his possession and custody, or to pay over to complainant the sum of eight thousand two hundred dollars, with interest and costs, and for such other and further relief as the circumstances of the case may require, &c.

The appellant answers, denying and qualifying the allegations in relation to the leaving of the slaves in his custody, and

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denying that there was any agreement whatever in relation to them; and says the slaves were left in his possession, subject to the orders of the complainant, and avers that he has fully settled with complainant and that upon a fair and equitable settlement, complainant owes him five hundred dollars; denies that complainant left with him promissory notes as alleged, except one note for one hundred dollars, which was paid to another person by direction of complainant; that appellant rented the plantation of complainant one year for one hundred dollars, and a part of it another year for fifty dollars, which amounts were paid to him, and no more; that the horse was left on his plantation, but not in his custody, and that the horse was sold by a third person, but appellant had nothing to do with the transaction; that complainant left on his premises some furniture, a quantity of old medicines, and some books, with which appellant had nothing to do except to give them house-room. Annexed to the answer is an account of sundry expenditures, marked Exhibit A, referred to in his answer.

No replication appears to have been filed by the complainant, but the defendant has waived this omission by proceeding to the trial as though the case was at issue.

Several witnesses seem to have been examined for each party upon commissions issued, and before a Master in Chancery; but none of the testimony is signed by the witnesses.

The decree recites that the cause "having been referred to a special master to take testimony and report thereon, and the same having been done and returned, and after an investigation and review of the whole case, and it appearing thereon to the satisfaction of the court" that the defendant should account to the complainant for the sum of twelve hundred and five dollars and ninety-two cents, with costs of suit; "that the master performed services of much labor in said suit, and his services are worth \$250;" therefore it is ordered, that defendant pay those sums, &c.

From this decree the defendant appealed to this court.

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Notwithstanding that the defendant, appellant, did not demur to complainant's bill, we cannot avoid applying a well-established rule in declaring that the claims made in the bill for the value of certain notes, for a horse, for a quantity of furniture, clothing and baggage, and for a lot of books, left in appellant's possession, and for which it is alleged he refuses to account, cannot be entertained in a court of equity, under the circumstances mentioned in the bill, in this case. Yet, so far as we are able to understand the record, these several matters, the subjects of an ordinary action on the case or trover according to the statement made, are sought to be made the subjects of equity jurisdiction, and are in part the basis of the decree of the chancellor.

We have examined the record in vain, in the attempt to ascertain from a master's report the foundation of the decree. The paper appearing in this record, which, in the absence of any thing else wearing familiar features, is presumed to be a master's report, is simply a statement of very immaterial portions of testimony taken and inspected by him, and gives no data upon which, to our comprehension, a decree can be founded in favor of the complainant. And yet for the services and "much labor" performed by the special master, resulting in two foolscap pages of "report," which states nothing required of him by the statutes or the rules, but violates both, the chancellor decreed the sum of two hundred and fifty dollars as his compensation.

The statutes, Thompson's Dig., 463 to 465, direct masters in chancery very plainly how to proceed in the performance of their duties. This statute is mainly a reiteration of the rules of the court. The rules require also (Rule 79) that all parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor. Neither the parties nor the master seem to have been aware of these provisions of the statute or the rules. Some other action of the chancellor than a decree of compensation to the master for his action in this case, should have been taken.

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Turning in despair from the decree and the report of the master, we have attempted to ascertain from the depositions on file, whether the decree should not be sustained at least in part. But we have been unable to glean the necessary intelligence from that source.

The Supreme Court, in *Robertson vs. Baker, and Macrae*, XI. Fla., 230, remarks: "In such a state of case, a court may well hesitate before passing definitely upon the rights of parties. The chancellor below, however, did arrive at a conclusion on this point and decreed accordingly; but as we are ignorant of the basis of the calculation or the process through which the conclusion was reached, we deem it to be most consonant with justice and equity that the decree be set aside and the accounts be committed to a competent master, to be properly adjusted. * * It is hazarding too much to make a decree in the premises without an intelligent report from a competent master." Such a report may be possible in this case, upon the testimony already taken, but if not, the chancellor may take such action as may seem to be necessary, in order to a proper disposition of the case.

We commend to the careful attention of the counsel and the clerks of courts, the suggestions of Chief-Justice DuPont, in the case of *Simpson vs. Barnard et al.*, V. Fla., p. 532-3.

For the reason here stated the decree must be set aside, and the cause remanded, with directions to the court to take such further proceedings as may be agreeable to the rules and practice of the court, and in accordance with this opinion.

Thomas H. and Theophilus West vs. James A. Chasten—Syllabus.

THOMAS H. AND THEOPHILUS WEST, APPELLANTS, VS. JAMES
A. CHASTEN, APPELLEE.

A, B, and C, being partners, agree upon a dissolution; B and C assign and transfer all their interest in the joint property to A, who assumes the payment of the joint debts, and covenants to save B and C harmless.

Held:

1. That the property ceases by such agreement to be joint property, and that the lien or equity of the retiring partners to have a sale of the property, and an application to the joint debts, is destroyed.

2. That as between C and A a relation analogous to that of principal and surety exists by virtue of A's assumption of the debts and his covenant, and that, saving the rights of the joint creditors, C has the standing of a surety in a court of equity.

3. When the liability of a surety has attached in consequence of the default of the principal, the surety who has been sued by the creditor may apply to a court of equity and compel the principal to relieve him from his liability.

4. Where the Chancellor has, upon a bill filed by the surety in such a case, appointed a receiver to take charge of the old stock and such property as has been purchased by the proceeds of sales of what was once joint property, this court will not direct such order to be vacated unconditionally in a case where the principal debtor has transferred a portion of his money to another State, and is doing such acts as indicate an intention to disregard his covenant, and which if not checked will result in loss to the surety. Such an order should be vacated only on such terms as would secure the application of such property to the payment of the joint debts to the relief of the surety.

Appeal from a decree of the Judge of the Circuit Court for the First Judicial Circuit, sitting in and for the county of Jackson.

A statement of the case is contained in the opinion of the court.

C. C. Yonge, for Appellants.

Hawkins and Bush, and *McClellan and McLean*, for Appellee.

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WESTCOTT, J., delivered the opinion of the court.

Thomas H. West and Theophilus West, defendants, and the complainant, James A. Chasten, formed a mercantile copartnership in the month of November, A. D. 1867, under the name of of West, Brother & Co.

On the 10th of February, A. D. 1868, the partnership was dissolved, and an agreement entered into between the remaining partner, Thomas H. West, and the retiring partner, James A. Chasten, by which the remaining partner assumed the debts of the firm, and covenanted and agreed to save the retiring partner harmless therefrom, the retiring partner transferring and assigning all his interest in the goods to Thomas H. West, the remaining partner.

An agreement substantially similar to this was entered into between Thomas H. West and his brother, Theophilus West, at the same time.

The joint debts having become due, the retiring partner, James A. Chasten, eight months after dissolution, files this bill against Thomas H. West and Theophilus West, alleging that he has been sued for the joint debts; that he has been threatened with involuntary bankruptcy; that Thomas H. West is sending his cash beyond the State, &c. He sets for the agreement upon the dissolution, and prays "a decree that Thomas H. West do specifically perform his covenant;" that he may be enjoined and restrained from any further disposition of the goods transferred upon the dissolution, alleging that he still has a considerable amount of the stock on hand; and that a receiver be appointed to take possession of the goods, to sell them and apply the proceeds to the payment of the debts of the late firm, unless the defendant, Thomas H. West, shall give security to dispose of the goods, and apply the proceeds to the payment of the debts of the firm and for general relief.

Upon the filing of the bill, an injunction is granted, and a receiver is appointed to take charge of the goods of the late firm.

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The defendants file answers, demur to the bill for want of equity, and move for a dissolution of the injunction, and to vacate the order appointing a receiver.

Upon argument of these motions, as well as the demurrer for want of equity, the original order appointing a receiver was modified, the receiver continued, the demurrer overruled, and the injunction continued.

From this order defendant appeals, and he prays here a reversal of this decree and the decrees and orders made by the Chancellor, upon the following grounds:

1. That the court erred in granting an injunction without notice.
2. That the court erred in granting an injunction and appointing a receiver, on the allegations of the bill before answer.
3. That the court erred in overruling the demurrer.
4. That the court erred in refusing to dissolve the injunction.

The consideration of that portion of the decree overruling the demurrer of the defendants to the bill for want of equity, renders it necessary to pass upon the bill in this aspect of the case in the first instance, and any statement of the facts controlling our judgment as to the injunction and receiver is deferred until these matters are reached.

The equities claimed in argument are two:

First. An equity of the retiring partner upon the dissolution, and notwithstanding the agreement, to have a sale of what is alleged to be joint effects, and an application to the joint debts.

Second. That Chasten, the retiring partner, by his contract with West, the remaining partner, stands in the relation of his surety, he having agreed to become principal debtor, Chasten having an equity arising from this relation, and under his covenant to save harmless, that entitles him, the debts having become due, and he having been sued, to a decree of payment, and a decree for the specific performance of the covenant under the facts in the bill.

The partnership was dissolved on the 18th day of February

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A. D. 1868. So long as the effects are impressed with the character of partnership property, so long as they remain joint effects, dissolution cannot destroy the right which each partner has upon a dissolution to a general accounting, the payment of the partnership debts and a division of the surplus according to their respective interests. Their connection remains until the business is wound up. "Between partners there are clear equities amounting to something like lien. They have equities to discharge each of them from liability, and then to divide the surplus." These equities and these rights, however, are like other equities, subject to be divested by the act of the parties. What is once joint property does not necessarily remain so always, and the question in this class of cases is, is this joint property, or has there been a severance? If it is joint, these equities, or as it is sometimes called lien, operates; if it is separate, then they cease to exist, and the property can only be affected by the operation of such equities as can ordinarily affect separate estate, where no such relation as partnership exists.

The question here then is simply, Is this joint estate, or is it the separate property of the defendant? Where there is a *bona fide* transmutation of the property from one partner to another, that is the end of the matter. At the dissolution the partner may call upon the effects by virtue of his equity to pay the partnership debts, but if he assigns or relinquishes his interest to the other to deal as he thinks fit with the property, to go into the mercantile world as a sole trader, the effects cease to be covered by the mantle of partnership property, and when this is removed so likewise vanishes these equities. If he has failed to resort to his equity when it was available, he is to blame himself.

Inquiry, then is necessary to ascertain here whether by the bargain of dissolution that which was the property of all has become the property of one. There is no doubt here, for the bargain was, that "Thomas H. West, in consideration of the sum of two hundred dollars, and the *release* and *assignment* to him of all of Chasten's interest in the dry goods, groceries, &c., belong-

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ing to the firm of West, Brother & Co., agreed to assume the payment of all Chasten's part of the debts (which was the whole of them), claims, and demands against the firm of West, Brother & Co., whether foreign or domestic, or whether existing in law or equity," and covenanted to hold him (Chasten) harmless, Chasten assigning and relinquishing all his interest to "Thomas H. West, his heirs, and assigns."

Thomas H. West has been for eight or nine months selling these goods on his own account. Should there be a surplus after paying joint debts, he is clearly not liable to his former copartner for any portion of it.

The legal effect of this instrument is to make what was before the joint property of all the separate property of one.

The case of Williams vs. Bush, 1 Hill, 624, cited at bar, went off on an altogether different ground. The property there sold was the "*individual property of Bush*," and I apprehend that appellee does not rely upon that as being a case to the point that this is joint estate, or when he invokes principles applicable to joint property. The question in that case was as to the application of a particular fund resulting from a sale of the *separate* property of one of the copartners. Spicer, the retiring partner, contending that from equities growing out of peculiar relations between himself and his former copartner, and the joint creditors *who had notice*, he was entitled to an application of the proceeds of sales of the separate property of the copartner to the satisfaction of the joint debt. When we come to examine the second point we will give this case a further examination, as in another aspect the principle upon which it went off has an important bearing in this case.

The case of Devau vs. Fowler, 2 Paige, 400, it is claimed is a case precisely similar to this. In that case it was agreed that Fowler should take all the stock and effects and pay off all the debts due by the firm, and indemnify Devau against the same. Fowler became insolvent, and was threatening to dispose of all the partnership property and appropriate the proceeds to his

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own use. It was held that the equity which existed in favor of each, on the dissolution, to have the partnership property applied to the payment of the debts, was not destroyed; the fair presumption being, in the absence of any express agreement to the contrary, that it was not the intention of Devau that the effects should be appropriated to the private use of Fowler, leaving the debts of the firm unpaid. It is beyond doubt true, both in England and the United States, that there is no such equity as to separate effects, and that this equity is operative only so long as it is joint property. The whole question is to some extent one of evidence, and there is but one way to reconcile this case with the other cases, and that is by the difference in the precise character of the agreement upon the dissolution. Compare, for illustration, this case with the case of *Ex parte Williams*, 11 Vesey, 3. In the last case the notice of dissolution simply stated a dissolution, and that all debts due from the partnership would be paid by the remaining partner. In a short time a commission of bankruptcy issued against the remaining partner, and the question arose as to whether there were any joint effects. Upon the bankrupt making affidavit that upon the dissolution the "agreement was that the retiring partner should give up and deliver to him the whole of the stock and effects; that he should have and take the same to his own use and account, and should pay all the joint debts, and that he never considered himself accountable for any surplus," Lord Eldon said: "There is distinct evidence of agreement that the joint effects shall be considered separate effects, and that fact calls upon me to declare the conclusion of the law that these are separate effects." In *Devau vs. Fowler*, the Chancellor held that a simple dissolution, with an agreement "to take all the stock and effects and pay off all the debts due by the firm, and indemnify complainant against the same," was not sufficient, and that there must be an express agreement that the effects assigned should be appropriated to private use. Here, then, the difference between these cases is in the character of the agree-

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ment upon the dissolution, and without saying whether the agreement was construed properly in *Devau vs. Fowler*, the question arises, is there not a great difference between the character of the agreement in this case and the case now under consideration? The agreement here was not that West should take the stock and pay the debts simply, but there was a release, assignment, and relinquishment of all his interest in the dry goods and groceries, choses in action, and other property whatsoever, belonging to the firm, to Thomas H. West, his heirs and assigns. It struck me that the operation of the agreement in *Devau vs. Fowler* was perhaps misconceived, and Chancellor Walworth, in 1846, says of this case, "I am not quite certain that this court gave the proper construction to the agreement of the parties in *Devau vs. Fowler*, in supposing that the intention was that the copartnership debts should be first paid out of the proceeds of the property, before the purchaser should be permitted to apply any part of that property to other purposes." 1 Barb., Ch'y Rep., 484. But whatever may be said of this case, the agreement between West and Chasten admits of but one construction, and that is the one we have given it.

It may not have been intended that West should appropriate these goods to his own use, but the bargain clothes him with this power. There is, therefore, no general equity arising from the character of the effects now in the hands of West, and this leads us to inquire, is there an equity from the changed relations of the parties? Upon the execution of this instrument, the relation of partners between West and Chasten was destroyed, and all equities arising strictly from that relation passed away with the assignment of the goods; but the necessary consequence of the destruction of this relation is the creation of another in this case. The debts of the late firm are still unpaid. Both of the Wests, as well as Chasten, remain liable as joint and several debtors to the creditors of the late firm. Although the agreement is that one of them shall retain the partnership effects and pay the debts, they continue nevertheless bound as princi-

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pals, and nothing which falls short of an agreement, express or implied, upon the part of the creditors to take the remaining partner as the debtor and discharge the other partners, can place them in the situation of principal and surety, so as to discharge the retiring partner by indulgence granted to the paying partner by the creditor. 4 Wash. C. C. Rep'ts, 271.

While this is true as to the relations to the creditors, it is not also true that upon West's receiving all the joint effects divested of the lien, agreeing with the retiring partners, in consideration thereof, to assume the payment of the debts that a relation analogous to that of principal and surety from that moment existed between the parties? West assuming all the debts as between Chasten and himself, he becomes the primary and principal debtor, and in addition to this he covenants to hold Chasten harmless from them.

A question here arises, whether, both being principal debtors originally to a third party, they can by contract between themselves subsequently become, as between themselves, principal and surety without the consent of the creditor. *Marsh vs. Pike, McLean & Towle*, 1 Sandford's Chancery Rep'ts, 204. Pike lent Marsh \$3000 on a house upon bond and mortgage. Marsh sold the premises, subject to the mortgage, for \$6000 to McLean, he assuming the payment of the debt. McLean conveyed the premises to Towle subject to the mortgage, and Towle assumed the debt. The debt became due. Marsh applies to McLean and Towle to pay it. Here is no modification of the original debt of Marsh to Pike. He is still a principal debtor, but McLean and Towle have assumed the debt, first by contract between McLean and Marsh, and afterwards by contract between McLean and Towle. Towle and McLean were in no manner connected with the creditor Pike, nor is there any understanding between Marsh and Towle. Upon these facts the Chancellor says: "There is no doubt but that as between Marsh and the other two, McLean and Towle, he is to be regarded as their surety. Not only were the mortgaged premises

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made the primary fund for the payment of the debt, but the payment of the debt was assumed as a personal obligation. Towle is the principal debtor in reference to McLean, and both stand in the relation of principal to Marsh. It is well settled that a surety, after the debt has become due, may come into this court and compel the principal to pay the debt. Towle comes within the doctrine upon which this court requires the principal debtor to discharge the obligation for the indemnity of the surety. He is the party to pay the deficiency if the premises are insufficient."

Here was a simple assumption of the debt of Marsh by these two parties, who were unknown to Pike; and without a covenant to save harmless, the surety was given relief before payment of the debt, and the only fact except the relation of principal and surety alleged which would give him standing in a Court of Equity, was that Marsh, after the debt became due, applied to McLean and Towle to pay off the bond and mortgage.

Waddington et al. vs. Vredenberg, 2 Johnson's Cases, 230. White and Stout were partners. After dissolution, "White assumed all the business profits and responsibilities, agreeing to pay Stout fifteen hundred dollars for his store, and indemnify him against all debts due by the partnership." Say the court: "After the dissolution of the partnership between White and Stout, and White's undertaking to pay the whole of the partnership debts, Stout in relation to him is to be considered as a surety merely."

Williams vs. Bush, 1 Hill, 624. Bush and Spicer were partners. Being indebted on joint account to Williams & Macy, they gave their joint bond to pay all sums of money loaned to them, on which judgment was entered six months before dissolution. Bush & Spicer agreed to dissolve partnership, Bush paying Spicer \$1000 and agreeing to pay all partnership debts and indemnify Spicer. Williams & Macy had notice of the dissolution and terms. The partners were indebted at dissolution to Williams & Macy, \$2100. After dissolution of the firm of

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Bush & Spicer, Williams & Macy *continued* loans to Bush upon the agreement that the judgment should stand as a security for them. Williams & Macy then dissolved, and after this Macy, who continues the business, makes advances to Bush upon the security of the judgment. One year and nine months after dissolution of the firm of Bush & Spicer, Macy levies an execution upon the *individual property of Bush*, who had become insolvent, realizes a sum of money under it, and the question arises how it shall be applied; whether to the joint debt of the old firm of Bush & Spicer, and thus relieve Spicer, or to the indebtedness of Bush to Williams & Macy, or to the indebtedness of Bush to Macy individually. Say the court: "As Bush had agreed to discharge all the liabilities of the firm, he was to be regarded as the principal debtor, and Spicer stood in the character of surety, and was entitled to all the equitable liens on the property of his principal;" and as the creditors had notice of these terms of dissolution, an equity arose which, together with the other facts, induced the court to direct an application of proceeds of the sales of Bush's individual property to the joint debt, to the relief of Spicer. Here the primary equity was the relation of principal and surety assumed by these parties with notice to the creditors. Whether the creditor should have been prejudiced as he was here by the entire relief of Spicer, in view of the insolvency of Bush, is a different question, but so far as any equities are administered between the parties arising from their contract, there is no doubt of its correctness.

These cases determine the relation of West and Chasten under their agreement. They are both cases in which the retiring partner assumed the debts of the firm, and we have in this case the relation of principal and surety, to which is superadded a covenant to save harmless, and without prejudice to the rights of the joint creditors, we must administer whatever equities, if any, result from this relation, and the covenant. The conclusion to which we come here is sanctioned by the familiar rule

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in bankruptcy, where the jurisdiction is both legal and equitable in its character. Partners being joint debtors, and upon the payment of the whole of the debts by one, entitled to *contribution*, a solvent partner "may with strict propriety be called as to the share belonging to his partner, a person liable for the debt of another, and in that character, is allowed to prove; and in 4 Madd., 477, it is said: "It is now settled, that a solvent partner winding up the partnership affairs, is to be considered as a surety paying the debt. Each partner is a principal debtor for his own share, and they are mutually sureties for the share of each other. 6 Bing., 306; 4 Mad., 477; 2 M. & S., 195; Collyer on part., 555.

This doctrine of the bankrupt court is only referred to, to show that this court, acting upon principles of equity, permits a solvent partner to occupy, for some purposes, the relation of surety to his bankrupt copartner, although each is liable for the whole to the joint creditor.

These views as to the relation between these parties may be thought, to some extent, to come in conflict with the reasoning of this court in the case of Griffin vs. Orman & Young, 9 Fla., 57. In that case, Sewall was a dormant partner, being one of a firm composed of Orman, Young and Sewall. After dissolution the goods were sold to Sewall, who agreed to pay the debts, giving bond, with security, to pay the debts. Judgment having been obtained by the joint creditors against Orman & Young alone, the decree of the court below substituted Orman & Young for the creditors, giving them a standing in equity against Sewall, by virtue of the judgment, who was no party to it. The court, upon appeal, reviewing the case in this light, say that it was an anomaly to give Orman & Young a standing against Sewall by virtue of judgments against them, to which he was no party; and this view of the court, looking at that case as they did, was undoubtedly correct.

As all of the creditors were not, in that case, parties to the arrangement, upon the dissolution, and knew nothing of it, it

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may be considered, for the sake of argument, that Orman & Young could not have been entitled to the lien of the judgment as against Sewall, even though Sewall had been one of the defendants in execution, and it would not affect the relation of West & Chasten here, or any equity which Chasten claims; for he seeks to be substituted to no judgment liens of the creditors, but to work out his own equities against one who, as to himself, stands in the relation of a principal debtor. The court, in this case, speaking of this substitution or subrogation of Orman & Young, say: "In what way did Orman & Young stand as *surety with the creditors*? Whose creditors were they? Were they not the creditors of Orman & Young? Did they advance money to pay the debt of Sewall? No; they advanced money to pay their own debt, as well as Sewall's. It is true, that Sewall had agreed with them, Orman & Young, to pay these debts, and given his bond, with security, to that effect, but no arrangement had been made with the creditors."

If this language is to be restricted to the matter of subrogation, then under consideration, it may be well enough; but if the answers to these questions are to test whether the relation of principal and surety exists generally, it cannot be sanctioned.

A late case in 17 New Jersey Eq. Repts., 140. A. & B. are joint obligors in a bond to C.; both, upon the face of the bond, are principals; while in fact, A. had joined in the bond at the solicitation of B., his co-obligor, by whom the money was used, and A. was given relief as surety.

Had A. advanced money to pay this debt, would he not have been advancing to pay his own debt as well as B.'s, and is not every surety a debtor to the person who is the creditor of his principal? Because he pays his own debt is it any reason why he cannot be satisfying that which is primarily a debt of another person, who is principal debtor with reference to himself? Is not the creditor of every principal the same creditor of the surety? As to the necessity of assent by the creditor to create the relation between the parties in the case before cited,

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decided by Chancellor Walworth, Pike, the original creditor of Marsh, knew nothing of McLean or Towle. McLean had "assumed" the debt of Marsh to Pike in his dealings with Marsh, and Towle had assumed the debt of Marsh to Pike in his dealings with McLean; and yet equity made Towle a principal debtor, and Marsh his surety.

To say that one of two persons owing the same debt cannot, by contract between themselves, stand in the relation, one as principal debtor and the other as surety, is doing nothing less than to deny the power to contract. A party can become the surety of two others, one of whom is principal in a bond and the other his surety, by contract with the creditor alone. In the case of *Craythorne vs. Swinburne*, 14 Ves., 165, Lord Eldon said: "If the real nature of the transaction is to be understood thus, that Henry Swinburne and Craythorne entered into a bond for 1200*l.* to the Mercantile Bank, Swinburne as principal, and Craythorne as surety, and Sir John Swinburne, who has no communication, as it appears, with them, proposed to the bank that he should become a co-surety, there is an end of the question; but if not constituting himself so-surety with Craythorne, he proposed to the bank only that he would engage to pay them if they could not get payment from either of the others, then he becomes surety for the principal and the surety in the bond, and not co-surety with the surety." It is thus seen that Lord Eldon makes a party who contracted as surety with the principal in the bond, a principal debtor with reference to another person, who became his surety without even his knowledge.

In *Marsh vs. Pike et al.*, Chancellor Walworth makes A., who in contracting with B. assumed a debt of C., which B. himself, in his contract with C. had assumed, stand in the relation of a principal debtor to C., and gives C. the standing of his surety in a court of equity. Here we have a court of equity making a principal surety to one in reference to whom, or with whom, he had made no contract, and a surety a principal to one in reference to whom he had made no contract. In the one case the

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creditor did not accept the principal debtor as his debtor at all, and in the other the surety did not stipulate with the creditor that he was to be received as principal debtor. Courts of equity, in such matters, are not limited to the precise and express nature of the contract.

Contribution among sureties does not stand upon any motion of mutual contract, but arises from the principles of equity and of natural justice, independent of the contract (1 Story Eq., 493) between themselves, much less the contract with the creditor. So in cases of insolvency of one of several sureties, that the share of the insolvent must be apportioned among the solvent sureties is not the result of contract, but is founded in doctrines of equity; and Lord Eldon says of this subject, when accounting for the jurisdiction at law, that “the *principle of equity* upon which a surety has a right to call upon his co-surety for contribution being established, raises the *implied promise* upon which the jurisdiction of courts of law on this subject is sustained.” 14 Ves., 164. It is thus seen that, independent of anything arising from the express contract, courts of equity often give relief.

Much, if not all, of this jurisdiction in reference to parties standing in such relations as principal and surety and co-surety in courts of equity, arises less from contract than from principles of natural justice; and in this case we but follow in that pathway in imposing upon West the obligation of principal debtor, which he in fact assumed by express contract, and extending to Chasten that relief which attaches to the relation which he bears to his former copartner.

In *Brewer vs. Worthington et al.*, 10 Allen, Mass., 329, the plaintiff had retired from the firm of Worthington, Flanders & Gould, of which he and the defendants had been members, conveying to them all his interest in the property of the partnership, and providing that they should assume and pay all the debts and liabilities, and save the plaintiff harmless therefrom. Justice Dewey, in commenting upon this contract, which is the

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same as that between West and Chasten, says: "This contract is something more than a mere contract of indemnity. It is also an agreement to assume and pay all the debts and liabilities of the late firm." This was a case at law, and it is to be regretted that the court did not say precisely what the contract was. If it was for more than indemnity, it was nothing less than that they would become principal debtors.

The effect of this agreement being, in equity, to place the complainant in the situation of a surety, and to make the defendant a principal debtor as to him, there are two classes of cases which are applicable. First. Those where there is the naked relation of principal and surety; and, Second. Those where the special covenant is superadded.

The case of Marsh vs. Pike et al., 1 Sanford, Ch'y Repts., 210, already alluded to, was a case of simple suretyship; and it was there held that a surety, after the debt has become due, may come into a court of equity and compel the principal debtor to pay the debt. From the decree of the Vice-Chancellor an appeal was taken, and the decree was affirmed by the Chancellor, in 10 Paige, 595. See also 4 Call., 202; 4 Mon., 492.

In Nesbit vs. Smith, 2 Brown, Ch'y Cases, 581, the language used gave a surety *general right* resulting from that relation alone. It was: "It is clear, and has never been disputed, that a surety, generally speaking, may come into this court and apply for the purpose of compelling the principal debtor for whom he is surety, to pay in the money and deliver him from the obligation;" but twenty-three years afterwards, in 1808, this case was reviewed in the case of Dale and Perry vs. Lolley, and the court say "a bill will not lie upon any *general equity* by a surety against the principal, to have an indemnity, or to have the money paid into court, where no further time has been given, where the day of payment has not elapsed, and the surety has not been damnified, or is not in evident danger of being so, or unless a distinct agreement can be proved that it should be done whenever the plaintiff called on him for it."

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receiver with modified powers. So far, then, as to the appointing the receiver without notice, the record discloses that the receiver now in charge, and the order defining his duties, was made after notice and argument. As to the want of notice of application for an injunction, there are many causes in which the giving notice would destroy its effective power and efficiency, and it would be the means often of augmenting the very wrong which it is invoked to prevent; besides, this court has heretofore laid down a general rule upon this subject, to the effect that a bill should not be dismissed or an injunction dissolved for deficient injunction bond, for non-payment of costs, or for want of notice. These matters can be remedied without going to that extent. 3 Fla., 351.

Upon the facts charged in the bill and admitted in the answer, we have seen there are such equities as create something more than a probability that the plaintiff will be *ultimately* entitled to a decree, and under such circumstances the granting an injunction, and the appointment of a receiver, are both matters within the discretion of the chancellor. Owens vs. Herman, 3 Mac. & Gov., 378; 2 Dan. Ch. Pr., (note,) 1409.

A receiver, however, against an acknowledged legal title, where the relief sought is a decree of payment, and the performance of an agreement to save harmless, and where there is no lien or acknowledged trust, should not be permitted except in a plain case.

If, however, in a case of this character arising out of confidential relations, the party acts iniquitously and unjustly, or fraudulently, pays no attention to his covenants, disregards the claims of his surety, and is pursuing such a course as threatens to result in his great damage and injury, the court may interfere. It will not do to wait until the threatened damage and injury occurs to such an extent as to ruin the surety. Then a court of equity will be powerless for good; and unless the creditor should intervene and attach before everything is made way with or sold and deposited in other States, the party

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will be ruined. In a case such as this the creditor can stand by and see this done, and his debt against Chasten is not affected; and the fact that is a matter entirely within his discretion to look alone to Chasten should incline a court of equity to extend its aid if it is necessary.

If West is pursuing such a course as will render the relief which equity will give totally inoperative when the decree is passed, then it is the duty of the court to take such action as is necessary for the effective protection of parties standing in these confidential relations, and if necessary, to take under its control such an amount of the goods of the late firm which were lately joint effects as will enable it to discharge the joint debts, relieve the surety, and make the covenanter carry into effect his covenants. This is what he has agreed to do, and a Court of Equity having jurisdiction to decree payment and performance, it would be a reflection to say that it had power to command him to do this, and yet, when his acts justified it, no power to restrain him from such acts as would place it beyond the power of the court to protect complainant or prevent his ruin.

And this leads us to look into the facts. The partnership was dissolved some eight or nine months before the bill was filed; the joint debts as disclosed amounting to about four thousand dollars, the partnership having been in operation about two and one-half months, a large stock being transferred to him at the dissolution.

The sales by Thomas H. West have been principally for cash, the charge in the bill on this subject, being that "the sales were principally for cash," and the answer, when specially interrogated upon this subject, being that they have not been "altogether for cash."

The bill states the amount of debts paid at a small amount over eight hundred dollars; the answer does not deny this. The bill charges repeated promises to pay at a given time, and a failure; the answer does not deny it.

The affidavits introduced upon the part of the complainant

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state that the sales of West, in cash, avreaged from nine and one-half to ten dollars per day, and that his expenses were small. The complainant has been forced already to pay a small amount of the debts. The affidavits set up that the goods were purchased on the credit of Chasten, the creditors relying upon his credit and character.

In May, 1868, the defendant states to one of the parties making affidavits that he had invested shortly before that time two thousand dollars in Missouri, and while not giving the precise amount, he states to another party that he has sent his ready money to Missouri.

Theophilus West, one of the defendants, although indebted in New York two thousand dollars, seems to have disposed of his goods, belonging to an old firm of West & DuBose, leaving his debts unpaid, and he is still liable for them twelve months afterwards, and becomes incensed when a creditor is informed that he can pay twenty-five per cent. of the debts, by a person who he himself had informed he could pay fifty per cent.

In the fall of 1868, Thomas H. West agrees with the attorneys of some of the creditors to pay in assorted stock at New York cost and charges, but when about to consummate the arrangement, insists that the goods are to be taken from either side of the store, taking first all on one side and then commencing on the other. The positive allegations of the answer are in many respects denied by these affidavits, and the circumstances surrounding the whole matter incline us to give credit to the affidavits. Thomas H. West obstinately and positively refuses to give any account of the debts, and when interrogated as to them in the bill, avoids answering. When applied to in behalf of Chasten and the creditors even as to assuming the debts, his reply consists of allusions to his "stubbornness and shrewdness," and a remark that if anything could be made out of him at law complainant was welcome; thus in effect positively denying any relief but that which the courts will grant. Some of the creditors offer to take the face of their claims without interest; he

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declines. He also declines individually to assume and secure the debts. When told that he has money to pay the debts, and he had better pay them, he answers, "I know that, but I can do better with the parties in New York;" the witness stating his expression to be that he said he would get them up at fifty cents on the dollar. Subsequent to this he is applied to again, and he then says he has sent all the ready money he had off to the West with his brother, and that he was establishing business there. In the meantime his surety, holding his covenant, is being sued and harassed with threats of proceedings in bankruptcy, and the defendant absolutely refuses to let him know what debts he has paid and what are still due. In replenishing his stock from foreign markets, it appears that some of the goods are shipped in the names of other parties.

These seem to be the facts from the bill, answer, and affidavits, used upon the hearing of the motion to vacate the order appointing a receiver, and in addition to them the defendant sets out in his answer a schedule showing that he is worth the sum of ten thousand dollars, which, instead of being any excuse, is the best evidence that his failure to avert the threatening and impending ruin of his surety, or to comply with his covenants, results from acts of his own entirely inexcusable, and, not to use a harsher expression, in the utmost bad faith. The statute of this State as construed by this court in *Ex parte Edwards*, 11 Fla., 188, if that statute is applicable to the present system, and the construction given correct, makes it necessary for courts of chancery to exercise their discretion in appointing receivers, with reference to the fact that an injunction is but of little value when applicable to personal property, and therefore to exercise it more liberally. Indeed, the practical abrogation of this writ for any good purpose, impairs the symmetry and perfection of a system which it would be more than difficult to improve, and makes it necessary for a court of chancery to resort to harsher means than it otherwise would.

In view of the fact that the receiver is authorized to take

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possession of only those goods which came from the hands of those to whose benefit they are now sought to be applied, and to those purchased with the proceeds of those goods, and the allegation of the bill *that West promised to so apply the proceeds*, and of the fact that although this is denied by the answer, yet West states that such was his intention at that time, as well as in view of the now manifest intention of Thomas H. West, as shown by his acts, and as the equity of the bill is clear, the decree of the court below must be affirmed; but we think as the legal title to these goods is in the defendant, and there is no specific lien and no express trust, it is but proper that the property should be restored to his possession upon his giving such security as may be satisfactory to the chancellor for his compliance with whatever may be the final decree of the court below to the extent of the value of these goods, and in case of appeal to this court, for his compliance with its decree, or the decree of the court below made in conformity to its order to the extent of the value of these goods.

It is therefore ordered, adjudged, and decreed that the decree of the chancellor is affirmed, and the chancellor is directed, in the event of the security mentioned above being offered, to vacate the decree as to receiver and injunction upon the terms stated.

**JAMES HARKNESS AND MARGARET M. HARKNESS, HIS WIFE,
VS. JOHN FRASER AND SOPHIA FRASER, HIS WIFE.**

1. Where a party in a confidential relation to another, as by voluntarily undertaking to aid the other in obtaining possession of his property in the hands of others, takes advantage of this relation, and by deception or improper influences induces him to part with it without adequate consideration, a Court of Equity may lend its aid to obtain redress, whether the strict relation of principal and agent exists or not.

2. Fraud in fact must be proved, and will not be presumed in the absence of facts tending to prove it.

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3. A party is not entitled to have his deed set aside and cancelled simply because he has not received the full consideration.

4. A deed will not be set aside, and property thereby attempted to be conveyed restored to the grantor, on the ground that he has not executed his deed in conformity to law.

In Chancery—appeal from the Circuit Court for Nassau county.

The opinion states the pleadings and facts.

C. P. Cooper for Appellants.

Sanderson and L'Engle for Appellees.

RANDALL, C. J., delivered the opinion of the court.

The bill states that some time in 1866, the defendants obtained from complainants a conveyance to Sophia Fraser, of a lot in Fernandina known as lot 7, in block 46, and that said conveyance was obtained by fraud and covin. That complainants left Fernandina a short time before the war, having owned and possessed said property, and went to New York, where they remained till the cessation of hostilities. During their absence one S. N. Freeman obtained possession of the property under an alleged sale by the United States Tax Commissioners, or some other way, and they could not obtain possession, although they redeemed the same in accordance with the acts of Congress. That John Fraser offered to act as their agent in obtaining possession, and impressed them with the idea, and made them believe, that he had influence with Freeman sufficient to accomplish a satisfactory arrangement, by which they would recover their house and premises; and complainants accepted his services, and trusted and confided in him. Nevertheless he kept postponing and deceiving their hopes, pretending he was endeavoring to effect the desired object, until at last, being so often disappointed and deceived, and defendant offering to buy the lot, they concluded to sell to him on condition that he would enable them to get a comfortable house in Fer-

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nandina, and agreed to take \$1000 for the premises, defendants becoming responsible for any incumbrances; and made and executed said conveyance with that understanding, but which \$1000 defendants never paid them; in lieu of which, John Fraser undertook to turn over to them, without executing any good and sufficient title in fee simple to the same, a lot in Fernandina, of less size, together with a small quantity of lumber insufficient to build a comfortable house; and after complainants, with the aid of Fraser, who controlled the work, had attempted to build, and had used up and exhausted the building material, and had only erected a rough frame without covering, complainants abandoned the work, and informed Fraser that he must pay the \$1000 or return them their property; which, strange to say, he had succeeded in obtaining possession of directly after he had obtained the deed from complainants, having pretended he could not get it for them without great delay; which, of itself, bore the appearance of fraud. And they believe this was the fact, and that the whole thing was worked in the way it was to defraud complainants of their property and get it for nothing, or much less than its real value. And complainants have thrown back the small lot and incomplete framework on the hands of Fraser, which he refuses to accept, although he has made no title to complainants; and defendants refuse to pay them for their property or return it to them, or do anything in the premises. And as defendants are proposing and endeavoring to sell and dispose of said lot 7, in block 46, complainants pray an injunction, &c., and a decree that defendants bring into court and deliver up the deed executed by them, to be cancelled, and that the title and right of possession is in complainants, and that the sheriff eject the defendants and put complainants in possession; and for other and further relief, &c.

The answer of defendants admits that complainants did execute the deed of lot 7 as alleged, but denies that it was done under all the circumstances stated. That Fraser was not the agent of complainants; did not offer his services, but merely

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stated to complainants that he would use his influence with Freeman to induce him to give up the property; did his best to accomplish the purpose; did not agree to get them a comfortable house; complainants placed the value upon their property, viz.: \$1000, together with \$140 and interest due to J. Finnegan, by mortgage thereon, and subject to existing incumbrances, viz.: possession by Freeman under a tax sale, and occupation by some negroes, for which defendants became responsible. Defendants deny the allegations as to non-payment of the consideration, and allege that full consideration has been paid; allege that they assigned their right, title, and interest in a lease for ninety-nine years from the Trustees of the Florida Railroad to Sophia Fraser, of lot 10, square 29, with improvements valued by both parties at \$600, which was taken and received by complainants as part of the consideration of the deed, which assignment of lease was written by Harkness; and complainants seemed well satisfied with the premises, and took possession and commenced building thereon, and have offered it for sale. Also defendants delivered complainants a lot of lumber valued at \$220, which was received by complainants as part of the consideration; performed labor as carpenter in construction of a house amounting to \$40, and Harkness was indebted to defendant, Fraser, in the sum of \$120 for premises rented to him before the war. That after the purchase Fraser took measures to redeem the premises from the tax sale by paying Freeman \$200, and bought off the persons who were in possession. He paid Finnegan \$140 principal and \$71 interest, and the mortgage has been cancelled. Have fairly and equitably complied with the agreement, and are ready to perform anything inadvertently omitted. Deny all fraud, covin, &c.

Complainants filed a general replication.

The cause was heard before the judge of the Fourth Circuit, on the second day of January, 1869, upon the bill, answer and proofs, whereupon the judge rendered a decree dismissing the bill with costs, from which decree the complainant appealed.

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The petition of appeal prays a reversal of the decree upon several grounds, which will be treated in the order in which they are alleged, in connection with the proofs.

1. That an agency was proven in John Fraser in the premises, which involved confidence from said complainants in him, and of which he took advantage, which vitiated the sale and rendered it null and void; and

2. "That fraud is apparent in the whole transaction on the part of John Fraser."

Agency is founded upon a contract, express or implied, by which one of the parties confides to the other the management of some business, to be transacted in his name, or on his account, and by which the other assumes to do the business and to render an account of it; and may be created by writing or verbally. 2 Kent Com., 612.

The complainants allege in their bill that John Fraser offered to act as their agent to obtain possession of their premises; made them believe he had influence with Freeman, and could accomplish a satisfactory arrangement in the recovery of their premises; and that they accepted his services and trusted and confided in him. No particular instructions were given him, and he, it is inferred, undertook, voluntarily, to assist them. The complainant, James Harkness, testifies that after he had redeemed his property from the tax sale, Fraser wanted to hire the property in question; that he consented to rent it to him if he could find out the agent of the tax purchaser; and that "Fraser suggested the necessity of having an agent there to obtain possession, and I appointed him;" gave him no written power, but regarded him as his agent and friend. After several months he wrote to Fraser to find out the agent and get possession. Mrs. Fraser, in behalf of her husband, wrote Harkness that Fraser had not obtained possession, but that he had found "that S. N. Freeman was the agent, but that he declined to give up possession unless the purchase money was refunded." This letter was "so unsatisfactory" that Harkness "remained in Savannah

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some months after its receipt.” Afterwards Harkness came to Fernandina to dispose of the property or get possession, and went to Fraser’s house, and he and Fraser went, at Harkness’ suggestion, to see Freeman, and told him that Harkness was the original owner, and offered to rent the house; but Freeman refused to rent it to Harkness, though he had offered to rent it to Fraser.

John Fraser, in the answer, denies that he was an agent for Harkness, or that he offered his services, but says he merely stated to him that he would use his influence with Freeman to induce him to release the property, and did his best to accomplish this purpose; and in his testimony says that he was not his agent, but acted simply as his friend. This is all the case shows in reference to an “agency.”

It is conceived that an agency, considered in its ordinary or commercial sense, is not established; but there evidently was a confidential relation existing between the parties, involving trust and good faith, and in cases of this character, if one party takes advantage of the confidential relation to impose upon another, and by imposition, deception, or undue influence, does an injury to the other, a court of equity will lend its aid to remedy the wrong done. See Dunlap’s Paley on Agency, 11; and Hugenin vs. Basely, 14 Ves. jr., 299. The evidence of the abuse of this confidential relation, as alleged by complainants is, that the defendant, Fraser, having undertaken to act in behalf of the complainants, neglected to bring about a satisfactory arrangement, failed to obtain possession of the property for the complainants, negotiated for the renting of the property from Freeman on his own behalf, purchased the property from the complainants, and soon afterwards obtained the possession, and has ever since occupied it. We fail to see any substantial evidence of fraud or imposition in these circumstances. The inference that Fraser, while pretending to act for his friend, was in reality taking advantage of his confidential relation, soothing him with fair promises and at the same time managing “to pre-

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vent the complainants consummating their wishes," and to obtain the property for himself, is not substantiated in the facts. It is true that Freeman refused to rent the property to Harkness; but there is nothing to show that Fraser was in any way responsible for this. Freeman, knowing that Harkness was once the owner, and perhaps having no great confidence in his tax title, and not wishing to place an antagonist in possession of the property in dispute, would very naturally refuse to rent it to him. It appears, also, that Freeman had offered to give up the property "on the purchase money being refunded," and that this was declined by Harkness. It does not appear how much this was, but it does appear, by the answer and the testimony, that when Fraser purchased the property, he paid Freeman two hundred dollars, and twenty-five dollars "to drop the appeal" which had been taken from the action of the Tax Commissioners. And this purchase by Fraser was made after the "confidential" relation between the parties had ceased, and after Finnegan had commenced proceedings to foreclose his mortgage. And besides, after Fraser had purchased and gone into possession of the property, Harkness says he had employed Fraser to sell another house for him, and because he did not do so, was one reason why he did not complete the building on the lot purchased of Fraser.

All the facts which tended to excite the suspicion of fraud on the part of Harkness, culminated with the taking possession by Fraser of the house, a few days after its purchase from Freeman; and yet Harkness does not seem to have been aware of, or suspected any fraud or unfairness, for several months afterwards. If any circumstances occurred subsequently to arouse any such suspicion, the evidence of it has not been placed in the record.

The complainants allege that Fraser "kept postponing and deceiving their hopes, pretending he was endeavoring to effect the desired object, until at last, being so often disappointed and deceived, and defendant offering to buy the lot, they concluded

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to sell to him, on condition that he would enable them to get a comfortable house, and agreed to take \$1000 for the premises, defendants becoming responsible for any incumbrances, and made and executed said conveyance with that understanding," &c. Now if it is true that they then discovered that they had been deceived and betrayed by Fraser, it is very strange that they should have had any further transactions with him, or given him an opportunity to consummate the very purposes of the deception.

It is not discovered that the fraud was very detrimental to Harkness, for the Rev. Mr. Baker testifies that Harkness agreed to sell him the property for two hundred dollars; and yet Fraser, soon after, bargained with him for it at one thousand dollars.

3. The third ground upon which the decree is sought to be reversed is, that "the supposed or attempted bargain and sale was *nudum pactum*, no adequate consideration having passed from John Fraser and wife to complainants."

The appellants cite the case of the Southern Life Insurance Company vs. Cole, 4th Fla. Reports, in support of this position. That case was entirely unlike the present. There the plaintiff undertook to foreclose a mortgage given by Cole, and the court found that there had never been a delivery of the mortgage, and that there had been no consideration of benefit or advantage to the mortgagor, or detriment to the grantee, and declared the bond and mortgage *nuda pacta*.

The bill charges that the complainants agreed to take \$1000, in addition to the payment of the incumbrance (something over \$200), and made and executed their deed of conveyance, "but which \$1000 the defendants never paid them, in lieu of which Fraser undertook to turn over to them, without executing any good and sufficient title in fee simple to the same, a lot in Fernandina of less size, together with a small quantity of lumber," and that after complainants had attempted to build, and used up the building material, leaving the house unfinished, "they abandoned the work, and informed Fraser that he must pay the

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\$1000, or return them their property.” And that complainants “have thrown back the small lot and incomplete framework upon the hands of Fraser, which he refuses to accept,” and refuses to return their property or pay them for it, &c.

The answer denies the allegation of non-payment of the consideration, and says that full consideration has been paid; that the defendants assigned their right, title and interest, in a lease for 99 years, of lot 10, square 29, with improvements thereon, valued by both parties at \$600, which was taken by complainants as part consideration for said lot 7, which assignment was written by Harkness; that complainants took possession of lot 10 and commenced building on it (and had offered it for sale); that Fraser delivered lumber of the value of \$220, also as part consideration; that he did carpenter work amounting to \$40, and that Harkness was otherwise indebted to him in the sum of \$120; that defendant paid Freeman \$200, to get possession of the house, and “bought off” the persons in possession; that he has paid Finnegan \$211, principal and interest, of the mortgage thereon.

The lease, in evidence, is dated 20th February, 1858, executed by the Trustees of the Florida R. R. Co., to Sophia Fraser, for the term of ninety-nine years, at an annual rent of sixteen dollars, payable annually, and provides that the lessee will be entitled to a title from the R. R. Co., at any time, on payment of two hundred dollars and all arrears of rent, taxes, &c. An assignment is indorsed, signed by John Fraser and Sophia Fraser to —— (erased.)

The testimony discloses a sale and conveyance by the complainants, to the defendants, of their lot, for the consideration of one thousand dollars and the payment of certain incumbrances; the possession at the time being in other parties, who made some sort of claim thereto, and whom the complainants found it difficult to dispossess, and they were unwilling to pay the amount required to obtain possession. The complainant James Harkness drew up the deed, and the complainants execu-

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ted and delivered it. The complainant H. also drew up an assignment of the lease on the back thereof, arranged for the payment of the rent in arrear to the railroad company, and of course knew what the lease contained. The name of Harkness in the body of the assignment was struck out by himself, for fear of subjecting the property to the payment of his debts, and he deposits the lease in the hands of Mrs. Fraser to hold until he should determine what name to insert instead of his own. The assignment was not acknowledged before an officer by Mrs. F., because it has not been thus filled up and completed. There has been no refusal to acknowledge and deliver it when required. It has not been demanded. The value of the leasehold was agreed upon at \$600. Lumber selected by Harkness has been delivered to him to the amount, or near the amount, contracted for. He took possession of the leased lot, occupied the house upon it eight months; commenced building; employed Fraser to work upon it; sold off some of the lumber; refused to receive more lumber; and undertook to repudiate the whole arrangement, on the ground, as he alleged, at one time, that he could not complete the building for want of means on account of failing to sell one of his houses; and at another time, because he believed he was being cheated in the lumber; having also received defendant's money to pay the rent due the railroad company; and after having refused to receive any more lumber, Fraser offered to settle up in money the balance due, but which Harkness says was never done; and there has been no effort at a negotiation toward effecting an amicable settlement. All this appears from the showing of Harkness himself.

On the other hand, Fraser gave possession of the leased lot and house, which Harkness occupied from May to January, paid up Harkness' mortgage to Finnegan of \$211, let complainants have about \$200 worth of lumber, paid Freeman \$200 and upwards to get possession of the house purchased, and so far as can be discovered, has done and is willing to do all that can be rightfully demanded of him in the premises. The precise state

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of the amounts between the parties does not appear, there being no master's report to that end in the record; and there is no prayer in the bill contemplating an account or a decree thereon.

4. The fourth ground of reversal is, "that Sophia Fraser never acknowledged her act in signing, sealing, and delivering the lease referred to in said bill of complaint, to the complainants, as required by the statutes made and provided for the conveyance of the separate property of married women; and otherwise John Fraser and wife did not execute a valid and legal title-deed in said lease lot to complainants or either of them."

This ground is, in the main, disposed of above. The reasons why the defendants have not completed the transfer of the lease are fully explained by the testimony of the complainant, Harkness, and there has been no refusal to complete such transfer. There is no allegation in the bill of complaint that the defendants agreed to make a perfect title to the leased lot. On the contrary, the testimony shows rather conclusively that the complainants bargained for the lease itself, and the estate it carries. They do not pretend to have been deceived or seduced into taking a lease when a deed was called for, and the testimony indicates that they are persons of fair intelligence. The bill, so far as it relates to this lease lot, simply alleges that the complainants agreed to give \$1000 for complainants' lot, "but which defendants never paid them; in lieu of which John Fraser undertook to turn over to them, without executing any good and sufficient title in fee simple," a lot and a quantity of lumber &c. There is no proof that there was any fraud in the matter and the whole case referring to the lease. Neither is there any charge in the bill that the property sold by defendant the separate property of Mrs. Fraser.

5. The fifth ground is that "Margaret M. Harkness, and the property in controversy having

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Separate property, as appears by the acknowledgment to the deed, is under the peculiar protection of the chancery court, against all over-reaching imposition and fraud, by whomsoever practiced. Besides which, her acknowledgment of her act in signing the original deed is irregular, which renders the whole act null and void; as the statute is to be strictly construed and pursued permitting conveyance of separate property of married women, and prescribing and directing the manner of conveying the same, as it is in derogation of the common law."

There is no allegation in the bill that the property sold by the complainants was the separate property of Mrs. Harkness, nor is there any competent proof of that fact. The mention of it in her acknowledgment does not put the question before the court for its consideration, nor is this recital of it very good evidence of the fact.

The bill alleges that the deed *was* executed by the complainants. The deed introduced in evidence in the case has appended to it what purports to be an acknowledgment, signed by Mrs. Harkness, and it recites that the acknowledgment is made before one Johnston, a justice of the peace, and that he attests the same; but instead of this, Justice Johnston's signature is not affixed, and it is signed "H. Timanus, justice of the peace." If in fact she did sign and acknowledge in presence of Timanus, as a justice, the recital in the body of the paper that it is made before another justice, may present a question to be determined in some other form of proceeding. It is not in the issue in this case. It is somewhat anomalous, that a party should come into a court of equity and demand that his deed be set aside because of his own blunder, or his imperfect execution of the instrument. If it be true that the property was her separate estate, and that she has not executed a conveyance of it in such manner as to convey the title, her remedy, if she has any, is by some other proceedings.

These suggestions are made only because the matter was dwelt upon in the argument with some earnestness, before this court.

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There is in the record the testimony of John Hedges, to the effect that he had purchased the leased lot at a city tax sale, and had taken a deed therefor in behalf of the railroad company, which was the owner of the land in fee. It is unnecessary, in this case, to determine what interest, if any, can be acquired by the owner of land purchasing it and taking a deed for the non-payment of taxes. But as the matter of this tax sale was urged in the argument, as aiding the supposed evidence of fraud, it may be replied that there was nothing in the case to show whether the taxes had been levied upon the property before or after the transaction between these parties.

The bill prays that the defendants may be decreed to bring into court and deliver up the deed executed by the complainants to be cancelled; that the title and right of possession may be decreed in the complainants, and that the sheriff eject the defendants, and put the complainants in possession, and for further relief, &c. We cannot find that the complainants are entitled to the decree here prayed.

The decree of the Circuit Court must be affirmed, with costs.

GEORGE J. ALDEN AND SEVILLA ALDEN, HIS WIFE, APPELLANTS,
VS. JOHN PINNEY, APPELLEE.

1. The plat of a town referred to in a deed as containing a description of the boundaries of a lot fixes these boundaries as satisfactorily as natural objects, and if in a deed referring to a plat as containing the general conformation of the lot granted, its locality is given by well-defined lines, and the width of the lot is given by measurement, one of the calls is in such language as it may indicate either aspect or a natural boundary, this doubtful call must be given that signification which is most consistent with the evidence in the case.

2. All obstructions to the navigation of a bay or harbor, not authorized by the Legislature, are public nuisances, but all structures built upon submerged soil between the line of high tides of a navigable bay and its chan-

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They are not *ipso facto* nuisances; whether they are nuisances is a question of fact to be determined in each case.

3. An obstruction to navigation, which is a public nuisance, being the subject of a proceeding at the instance and in behalf of the State, by which it may be abated, and the person guilty of its erection punished, an individual cannot maintain an action, either at law or in equity, to have it abated, or to prevent the creation of other like nuisances, unless he sustains damage beyond and in addition to that which falls alike upon the public, and he must seek relief in a court of law or equity, as the nature of his special injuries and the remedies for them should determine to be appropriate.

4. Where the erection of a structure upon a public road or street, in a city, is threatened, the structure being a public nuisance which works special damage to a neighboring proprietor in the enjoyment of his property in the vicinity, as well as to the value of it, a court of equity will grant an injunction to restrain its erection, but if the structure is some distance from the true line of the road or street, and does not interfere with the use to which the road is dedicated, it will not, on this ground, restrain its erection.

Appeal from Escambia Circuit Court.

A full statement of the facts and pleadings is contained in the opinion of the court.

C. C. Yonge, for Appellants.

Bill to compel defendants to remove an ice house from a water-lot fronting a lot in city of Pensacola claimed by complainant, and to enjoin them from erecting other buildings on said front, &c.

Defendants deny the title of the complainant, allege title in themselves, deny that the structure is a nuisance, and demur for want of jurisdiction, there being adequate remedy at law.

Argument:

1st. That the demurrer was not disposed of in the circuit court, and case should be remanded. Taylor vs. Baker, 1 Fla., 245; McKinnon vs. McCullom, 6 Fla., 376; Pearce & Son vs. Jordan, 9 Fla., 529.

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2d. The Circuit court should have sustained the demurrer.
1. Because if, under the Riparian act of 1858, complainant be the owner of the batture in front of lot E, then his remedy was at law by action of ejectment, trespass, or other appropriate action.

Either the want of an equitable title or the absence of a legal title is sufficient reason for denying equitable relief. *McAfee vs. Lynch*, 26 Miss., 267.

That full compensation can be had at law is the great rule for withholding the strong arm of the Chancellor. *Posey vs. Wright*, 31 Penn., Hilliard on Injunctions, §23, and note A.

Injunction will not be granted where adequate remedy at law, at least till the right to redress be established at law. *Arnold vs. Kelper*, 24 Mis., 273. The general rule is that action should be brought to establish right before injunction is asked. *U. S. vs. Parrot*, 1 McAllister, C. C. Rep., 271. If title of complainant be denied, must show former recovery or long possession. Hilliard, §33.

Legal right must be asserted by legal means, and equity will not lend its aid where justice does not imperiously demand it. Hilliard, §36; *Bosly vs. McKim*, 7 Har. & L., 468; *Irwin vs. Dixon*, 9 Howard, S. C.; *Mohawk vs. Utica*, 9 Paige, 554.

Equity interposes to restrain irreparable mischief, suppress interminable litigation, or prevent multiplicity of suits, and in these cases will ordinarily require that right be first established at law. *Bean vs. Coleman*, 44 N. H., 539; Hilliard, 270, 271. Must be case of strong or imperative necessity, or right must have been previously established. 271.

Where matter complained of may or may not be a nuisance, it must be first ascertained by a jury. *Kirkman vs. Handy*, 1 Humphreys, 406; 1 Grant, 412. Equity will not interpose when damages will compensate. *Gray vs. Ohio*, 1 Grant, 412. Nor if evidence is conflicting, and injury doubtful or contingent. *vs. President*, 6 Indiana, 223; *Butler vs. R*.

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All this doctrine especially applicable when nuisance is to
Land. Coe vs. Lake Co., 37 N. H., 254.

Amount of damage, sometimes material, to consider. H., 272.
As to public nuisance, see H., 273, §3.

Not public, because a nuisance to several persons. H., 275, §8.

Test as to equity jurisdiction in Pennsylvania case, is loss of
health and sleep, the enjoyment of quiet and repose, and the
comforts of home, which cannot be compensated in damages.
H., 269, 270.

No individual can prosecute for public nuisance in his own
name (by injunction), unless such nuisance be irreparably inju-
rious to himself. *Spooner vs. McConnell*, 1 McLean, 358, 359;
18 Ves., 215; 6 John. Ch. 439; *Atty. Genl. vs. Nichol*, 16 Ves.

Equity will take jurisdiction of nuisance at instance of private
party only when he is in imminent danger of suffering special in-
jury, for which the law would afford no adequate remedy. *City*
of Georgetown vs. Alexandria, 12 Pet., 98.

Though nuisance public, if extreme probability of irreparable
injury to property of plaintiff, with danger to its actual exist-
ence, injunction will be granted. *Crowder vs. Tinker*, 19 Ves.,
616. Public nuisance to obstruct highway, but can every one
having right to travel ask injunction? 1 McLean, 359, 360.

The person obstructing would be liable to public prosecution.
1 McLean, 360.

Not enough that plaintiff says he is injured. He must show
how he is injured. 1 McLean, 360.

To be deprived of "free circulation of air and an unobstructed
view," is too fanciful and is not of appreciable value. Its value
would depend upon the constitutional temperament and disposi-
tion of the individual owner of an adjacent lot. Some persons
would prefer to be relieved of the glare caused by a large expo-
sure of water, and some protection from the wind might be
agreeable to some constitutions, especially if subject to chills.
The damage, if any, is too slight. *De minimus non curat lex.*

The principle is, that in case of a public nuisance where suit

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brought by private person, he must aver and prove special injury and damage. 12 Peters, 98.

If the water front is a *common*, then the question whether the obstruction below high-water mark is a nuisance is a *questio facti*, and not a *questio juris*, and must be determined by a jury. Angel on Tide Waters, 145, also 200.

If the *locus in quo* is the property of the plaintiff, as he asserts, then his remedy is by appropriate action at law to oust the intruder.

If it belongs to the public, then the right of occupancy belongs to the first occupant, and this right is called the *jus preventionis*. The only question then is, does this occupancy injury the public? Angel, 168, 169, 170.

Whether it is an injury, is to be determined by a jury upon evidence. Angel, 162.

That the Riparian act of 1856 provides that a remedy "by bill in chancery or at law." ——— does not show that the appropriate remedy in this case is in chancery. Complainant could as consistently argue that because the doors of both courts were opened, that he could avail himself of an action at law, where chancery furnished the appropriate remedy.

3d. But should it be held that a riparian proprietor has a standing in equity, for the relief prayed in this bill, then I insist that the proofs do not show that the complainant is a riparian proprietor.

1st. It is insisted by complainant that a common or street cannot be subject of a grant. If it should appear, then, that a street or common intervened between lot E, and high-water mark, then, according to this doctrine, the city could not have conveyed title to Gonzales, under whom complainant claims to the fee to the street or common, or to the site of the ice house, whether any street intervened or not.

2d. But the city did not undertake to convey the land to the bay, but only such parcel of land as was included within definite metes and bounds, extending 58 feet 8 inches from Ricova street,

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and 90 feet on the bay. The language is not 58 feet 8 inches to the bay, but 58 feet 8 inches from Ricova street, and when the deed comes to describe the east and west line of the lot, it says, "90 feet on the bay." That is, fronting the bay, or with a bay exposure, &c. Pensacola is said to be on the bay of Pensacola, and Jacksonville on the St. Johns river, and yet many lots in each city are a great distance from the water, as is said of Naples in a case in 6 Martin, Rep. The words then, "90 feet on the bay," are not descriptive of boundary, but of aspect.

3d. Though a natural boundary will control course and distance, yet a boundary by a natural object that is inconsistent with the other calls of the deed, will be controlled by the other calls that are inconsistent therewith. See *Barklay vs. Howell*. 6 Peters.

4th. Again: The extent of lot E being toward the bay, 58 feet 8 inches from Ricova street, and Ricova street having, as is shown by the map in evidence, a straight boundary on the north, must also have a straight boundary on the south, which cannot be if the water line be the boundary.

5th. The language in the deed of the city to Gonzalez is, "according to the allotment of the Cabildo and the new plan of the city." A copy of the map containing this allotment and plan is in evidence, and shows the southern boundary of lot E to have been at the time when this allotment was made in 1814, quite distant from the water line. The survey made by T. Moreno, city surveyor, in 1866, shows the southern boundary to be about 62 feet from the water line, which is about the distance it was in 1814, when the allotment was made, as is shown by the map.

6th. The complainant relies on a solitary witness to show that lot E extended to the bay, Francis Touart; and he evidently alluded to storm tides. No importance was attached to his testimony by the defendants, as is shown by the cross examination, and it really, as it stands, amounts to nothing. He says: 'High tides ran ten or twelve feet from foundation; at

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some tides water went over the house. Water went over in storm." So, "some tides," and tides "in storm," and "high tides," which, in this connection, evidently mean such high tides as prevail in storms, go over a large portion of the city of Apalachicola and of the city of Key West; but it has not been pretended that lots that reach the water on such occasions are water lots, or such lots as entitle the owners to riparian rights. If witness Touart meant anything else, then he is contradicted by both the maps in evidence, and by T. Moreno, the city surveyor.

4th. Assuming, then, that it is not proved that lot E did reach the water, and it is not required that defendant should prove that it did not, what rights has the complainant to land on the other side of the open space or street left "in the allotment of the Cabildo and the new plan of the city?"

This allotment and plan was made in 1814, from which date, at least, this space has been left open as a street or common. At the time of the allotment there was no city corporation in existence in which the title to lot E, or the dedication or fee of the street, could vest. The title was in the crown of Spain, and passed to the United States under the treaty of 1819, and by act of Congress of 1826 passed to the city of Pensacola, the town having, in the mean time, been incorporated, to wit, in 1862.

The action of the Spanish authorities in laying off lot E and the adjacent streets, and leaving this space open as a street, and the non-action of the United States in asserting title thereto, and suffering it to be used as other streets, was as effectual a dedication as if it had been named as a street. A street is not constituted by being named, or by being called a street. It is the use to which it is appropriated that constitutes a street. A highway in a town is called a street. In the country it is called a road. This open space was as effectually dedicated as was the open space in New Orleans, which was called a "quadrant" and to which the Supreme Court, in case of U. S. vs. City

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New Orleans, 10 Peters, say the U. S. had no claim. The doctrine contended for is, that a city cannot appropriate property that is dedicated for a particular use, to any use inconsistent with the dedication; and I insist that it is incumbent on the complainant to show that the erection of an ice house on the batture or soil under the shoal water, 90 feet at least from high-water mark, is inconsistent with the right of way in and on the open space between lot E and high-water mark before he can ask the interposition of a court of law or equity.

The allegation that the city has sold the site of the ice house to the defendants, goes for nothing. If the city had no title, the sale is a void act. If it had title, then it had the right to sell. The only material inquiry is, the use to which the site is appropriated. Does the ice house interfere with the highway along the beach, the line of which is 90 feet distant? It is absurd to suppose that it does. But if there is doubt about it, then the question should have been referred to a jury to determine, and there was no evidence before the court of chancery to enable it to determine the issue, if it were competent to determine it.

The authorities do not establish the proposition, that land held subject to a servitude may not be used for other purposes than those at first contemplated, but only that the use shall not interfere with the servitude to which it was subject. In the case of *Barklay vs. Howell*, 6 Peters, it was held that the open space south of lots on Water street was dedicated as a street and the appropriation by the city of Pittsburg of the margin nearest to the river, (there being sufficient space left for a street,) for wharves, was not inconsistent with the dedication, and the city was permitted to use these wharves as a source of revenue. This was certainly not as a highway or street.

In case of *U. S. vs. City of New Orleans*, 10 Peters, court held that the erection of a house on the quay, which was held under a dedication as a quay, the house not interfering with the use of the quay, was not improper.

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But whether the defendants have acquired any right to erect the structure complained of or not, from the city of Pensacola, or otherwise, or whether they have acquired title to the site of the ice house, it would seem to be very clear that the complainant has none. It is conceded that the dedication of a street does not necessarily divest the owner of the fee, but it does not necessarily follow that the purchaser of an adjacent lot acquires the fee to the street. He may, if apt words are used to convey it. The word appurtenances may, for illustration, convey the fee to the street, or other expressions showing the purpose of the grantor. It is certainly competent for the purchaser to sell an adjacent lot, retaining the fee in the street. In the deed of the city to Gonzalez, we insist the city did not part with the fee to any part of the street. See the deed.

But where the language of a deed conveys the fee to the adjacent street to the grantee, then the fee extends only to the center of the street, unless the grant be to property on both sides of the street. This subject is fully discussed and decided in case of Ogden vs. Banks, 2 Black., S. C. Rep., in which case the street called Sand street bordered on the shore of Lake Michigan, and was intended to be 66 feet wide, and was of that width where there was land enough to admit it; but opposite the lot of the plaintiff, owing to the proximity of the lake, there was less than 33 feet of land, one-half 66. It was held that the purchaser of lot 54, adjacent to Sand street, which ran into the lake, took, under the language employed in the deed, the easterly half of the fraction of the street that bordered the lake, subject to the public use, and the original proprietor retained the fee in the westerly half which bordered on the lake, and was, of course, entitled to the accretion and all riparian rights. 2 Black., 68.

My argument then is:

1st. That the complainant having an adequate remedy at law, the court below ought not to have taken jurisdiction of the cause.

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2d. That the court ought to have referred the question of title **to** a jury for determination.

3d. That the question of nuisance or no nuisance ought to have **been** determined by a jury.

4th. That if it was competent for a court of chancery to **de-**
termine it, there was no evidence before the court to establish **the** fact.

6th. That the evidence did not show that complainant was **en-**
titled to riparian rights, because,

1st. It did not show that lot E extended to high-water line.

2d. That apt words of conveyance were not used to convey **t**
he fee of the street to Gonzalez.

3d. That if conveyance was sufficient to convey the fee, that **i**
t would only extend to the centre of the street or common.

5th. That the use of the site of the ice house for an ice house **was**
not inconsistent with the servitude under which the space **to**
which the site of the ice house was appurtenant—to wit, the **s-**
pace between lot E and the water—was held.

Lastly, That if all these grounds should be overruled, that the defendant was entitled to have had the judgment of the court below upon his demurrer, and the case should be remanded for further hearing.

Campbell and Perry for Appellee.

On the map of the city of Pensacola, known as the plan of **the** Cabildo, made by Vicente Pinado in 1814, there is a lot **fronting** on the bay designated by the letter E, and referred to in a marginal note as a lot reserved for “a market-house and **store-**
houses.” In Executive Doc., page 166, lot E is described as “grounds reserved for the market-house and public **maga-**
zines.” The south line of the lot did not, according to the map, **extend** to the water, and there is between the south line and the **bay** an open space, which extends along the front of the town, **which** space is without designation as a street, road, or quay. The **report** of the Land Commissioners, however, fixes the character

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of that space, and shows that it indicates only a road along the coast without prejudice to the rights of "alluvion and avulsion," in the adjacent proprietors. Executive Doc., 74, 75.

The width of lot E is not stated on the map of the Cabildo, but according to the scale it is over sixty feet.

By the act of Congress, April 22d, 1826, Sec. 7, "the lots reserved for market and other public uses in the plan of the constitutional Cabildo, are relinquished and confirmed to the corporation of Pensacola."

On 19th February, 1827, a part of lot E was conveyed by the city of Pensacola to Manuel Gonzalez in exchange for another lot; and in the resolution of the Board of Aldermen authorizing the Mayor to execute the conveyance, as well as in the deed itself, the portion intended to be conveyed is described as follows: "The easterly part of the new market-lot, where the flag-staff formerly stood, and marked by the City Surveyor, ninety feet in front on the bay, and fifty-eight feet inches in width, agreeably to the allotment of Cabildo, and the new plan of the city." On the same day, 19th February, 1827, the following resolution was adopted by the City Council: "*Resolved*, That the City Surveyor be requested to survey, and make an accurate plan of the building lots and enclosures as they now stand, and also a plan of the original grants on the bay front, from the east corner of the market-house to Velasaca's corner, in order to enable the City Council to determine upon a permanent bay front."

Pinney, complainant in the court below, derives title to the above described portion of lot E by mesne conveyance from Manuel Gonzalez, who, with those claiming under him, have held adverse possession of the lot since 1827, a period of over forty years, during which time it has been annually taxed by the city to Gonzalez, and those claiming under him.

Francis Touart proves that ordinary high-tide mark was about ten or twelve feet from the warehouse which he assisted in building twenty-five years before his examination; and

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Theodore Morneo, surveyor, proves that the south line of the lot, according to the calls of the city's deed to Gonzalez, would be about thirteen feet five inches from the foundation of the building.

On 4th August, 1827, a committee appointed by the Board of Aldermen of the city of Pensacola to inquire into the expediency of establishing a building line on the bay, reported, with the approbation of the Board, "that the English and Spanish plans of the town show clearly and distinctly that the space between the water-lots and the bay was reserved as *common property* for the *use and benefit of the city*, and designed for the erection of wharves and docks, the establishment of streets, and other general uses for the common benefit."

All that portion of lot E not embraced in the Gonzalez deed was in 1867 leased to Lingan & Co. for a period of ten years, for the purpose of erecting a planing-mill.

In 1866, a right of property was asserted by the corporation to the entire water front, so absolute as to authorize its sale and appropriation to any use whatever. At the same time a similar claim was asserted by Alexander C. Blount and Peter Knowles under a pretended grant, alleged to have been made by the Spanish Government in 1817 to Vicente S. Pintado, of whose heirs they assert themselves to be trustees, but without any evidence of their right or authority so to act. On 21st February, 1866, these rival claimants entered into a covenant, in which they agree to lay off into lots and sell the entire water front of the city from the shore to the channel of the bay. Lots were accordingly laid off and sold and Sevilla Alden, appellant, purchased several in front of that portion of lot E owned by Pinney, and upon said lot erected an ice house, and in their joint answer she and her husband assert their right to erect other structures.

The covenant between the city and Blount and Knowles provided for a settlement of the question of title as between them by an *agreed* case to be submitted to the Supreme Court of the

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United States by appeal from the District Court. Subsequently a resolution was passed by the City Council requiring the City Attorney *to institute suit against the claimants under the grant*, although Pintado has not been in Florida since 1816, and there is no evidence of the assertion of title by any person claiming under him since 1826, except the self-constituted trustees of his heirs, Blount and Knowles. The resolution asserts it was passed in accordance with the “plighted faith” of the city ; but when or how that faith was plighted does not appear.

No original grant to Pintado was produced at the hearing in the circuit court. The paper in the record offered at the hearing as evidence of the grant is a copy of a document found in the archives at Pensacola, which purports to be a copy of a copy of the original grant, the original copy having been made at Havana on 18th October, 1821, by Mauricio Poras Pita, notary of war, who was not the custodian of the original, and asserts in his certificate that he returned the original grant to “the interested party.” The paper in the record is in fact a copy of the documents upon which the Land Commissioners acted in 1825, and in reference to which they say: “They are copies from Havana obtained subsequent to 24th January, 1818, when we are entitled to the original under the solemn stipulations of the treaty between Spain and the United States.” Executive Doc. Report 10, pages 70 to 76.

That portion of the pretended grant, of which the *locus in quo* is a part, is particularly described in certificate C, and is part of the 10,000 arpents of the “royal domain” referred to in the concession. Besides the 10,000 arpents, of which the *locus in quo* is a part, there are a number of city lots embraced in the grant. Both the lots and the 10,000 arpents are granted “without prejudice to the third,” and again, “without prejudice to a third who holds a better right;” and with the condition to build on the one, and cultivate and improve the other in the most convenient manner according to the disposition of the matter for the peopling of that province.” In reference t

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The water property the grant says, "in full property and for **t**he purpose of constructing wharves and houses for bathing, **r**eserving and saving not only the *rights of his majesty*, but **a**lso those of the public, at all times, whenever it becomes **c**onvenient, and it be designed to construct wharves with whatso-
ever funds, municipal or common, intending the exclusion only **w**ith respect to particular individuals."

The Land Commissioners in 1825 rejected the grant because **n**o evidence of its authenticity was presented to them except **c**opies as above stated; and because "the character of the claim to part of the bay and St. Rosa's Island is calculated to create the presumption of fraud."

The Act of Congress 23d May, 1828, confirms the grant to the extent of the quantity contained in one league square, or 5,760 acres; but it is expressly provided that what is embraced in certificate C, *i. e.*, the water front, shall constitute no part of the quantity confirmed; and the relinquishment of the excess over and above the quantity contained in a league square is made a condition precedent of the confirmation.

Neither Pintado, nor any one claiming under him, had, up to the time of filing the bill, ever built a bathing-house or wharf in front of the town.

PLEADINGS.

The bill was filed in the court below by Pinney, the appellee, **a**gainst the appellants. It alleges that complainant is the **o**wner of a part of lot E as above stated; that according to the **p**lan of the city of Pensacola, referred to in the deed from the **c**ity of Pensacola to Gonzalez, there is no street between the **l**ot and bay; that at the time the deed to Gonzalez was **e**xecuted the bay was the southern boundary of his lot; and he is **a**ccordingly entitled to all the rights and privileges of a riparian **o**wner, amongst which are those of accretion; free access to the **h**arbor from his lot without let or hindrance; an unobstructed

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view; and a free circulation of air, as well as all the other privileges appertaining to a lot fronting on the bay. It further alleges that complainant, and those under whom he claims, had for thirty-nine years enjoyed all the privileges incident to the ownership of a lot fronting on the bay; that the bay in front of his lot had during all that period been free from obstructions until respondents Alden and wife erected the structure referred to; and that the city could not sell the batture in front of complainant's, or authorize in any manner the violation of his rights derived under the deed of the city to Gonzalez. And it prays that respondent may be required to remove the structure complained of, and that they may be enjoined from erecting any others in front of complainant's said lot.

The answer neither admits nor denies complainant's title to the portion of lot E claimed by him. It alleges upon information and belief, that the lot did not extend to the bay, but extended only fifty-eight feet and eight inches from Recova street towards the bay; and alleges that the description of "said lot set forth in the deed from the city to the said Manuel Gonzalez is false and incorrect, and not agreeably to the plan of the Cabildo, and the new plan of the city." It admits the erection of the structure, mentioned in the bill, in front of complainant's lot, and asserts the right of respondents to erect other structures, by virtue of a purchase of lots in front of lot E from the city of Pensacola, and the heirs of Pintado, to whom the *locus in quo* was granted by the Spanish Government; and that the shallows in front of lot E were free from obstruction until the erection of said structure by respondents; and objects to the relief prayed by the bill, because complainant had a complete remedy at law.

DECREE.

The circuit court decreed the relief prayed by the bill; and from that decree an appeal was taken to this court.

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ARGUMENT.

The appellee asserts five general propositions in support of the decree of the circuit court.

First. The title of appeal to that portion of lot E embraced in the calls of the deed of the city to Manuel Gonzalez is perfect.

Second. All the property rights which the city did or might have enjoyed as incident to the ownership of that portion of said lot are vested in the appellee; and he alone is entitled by virtue of such ownership to all the rights and privileges conferred upon owners of water-lots by the act of the General Assembly for the benefit of commerce. Laws 1856, page 25.

Third. The existence of a quay, street, or road along the shore between lot E and the bay, did not authorize the city to lay off the batture of shallows of the bay into lots and sell them to individuals to be enjoyed as private property.

Fourth. The appellants cannot justify the wrong of which the bill complains under the grant alleged to have been made to Vicente S. Pintado by the Spanish Government.

Fifth. That either as a riparian proprietor whose individual rights have been violated and threatened with further violation; as a front proprietor peculiarly injured by the infraction of a public and common right, appellee was entitled to apply to a Court of Equity for the relief for which his bill prays, and which the circuit court granted.

First. The title of appellee to that portion of lot E embraced in the calls of the deed of the city to Manuel Gonzalez is perfect.

Lot E was the property of the King of Spain, for it was set apart for his magazines, as well as a retail market. It passed under the treaty to the United States; and by them it was relinquished and confirmed to the corporation of Pensacola by the Act of Congress of 1826. IV. Stat., 284.

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Observe the difference in the language employed in the Act of Congress in connection with the “market-lot,” and lots of that class, and that used in reference to other lots, such as those for school, church, &c.

That the term “market-lot” used in the Act of Congress and the city’s deed to Gonzalez, is employed as descriptive of the lot, rather than as indicative of any special dedication as a market lot, is shown by the marginal note of the map of the city, and Executive Doc., page 166, where it is designated as a lot for storehouses or magazines as well as a market.

That the title acquired by the city under the Act of Congress was in the estimation of her officials strictly proprietary, is shown,

First. By the conveyance to Gonzalez.

Second. By the lease to Lingan & Co.

But admitting a dedication of the lot for a market, the legal title at least was in the city under the Act of Congress 22d May, 1826, and the use in the people, of which the corporation was the trustee. The case then presented is that of a trustee conveying the legal estate, not only with the acquiescence of the cestuis for forty years, but with their express annual assent for that period by the annual taxation of the lot.

This, then, is the case of a grant made with the assent or acquiescence of every person who had a right to question it.

Again, if the title of the lot was vested by the Act of Congress of 1826, in the corporation, the title is not in the United States, nor in the State; and therefore the statute of limitations has perfected appellee’s title according to the calls of the deed of the city to Gonzalez.

Rowan’s Ex’rs. vs. Portland, 8 B Mon., 232; Armstrong vs. Dalton, 4 Dev., 566; Commissioners vs. Taylor, 2 Bay, 282; Fox vs. Hart, 11 Ohio, 414; Angel on Highway, 311; Cincinnati vs. First Presbyterian Church, 8 How., 238; Camden Orphan Asylum vs. Lockhart, 2 McMullen, 84; County of St. Charles vs. Powell, 22 Miss., 525; People vs. Clark, 5 Selden, 349.

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Second. All the proprietary rights which the city did or might have enjoyed as incident to the ownership of that portion of said lot are vested in the appellee; and he alone is entitled in virtue of such ownership to all the rights and privileges conferred upon owners of water lots by the General Assembly for the benefit of commerce. Laws 1856, page 25.

According to the common law, where land is situated on tide waters, the boundary between the rights of the sovereign and the subject is ordinary high-water mark. Angel on Tide Waters, 66, 71, note.

Under civil laws, which prevailed in Florida whilst it was a Spanish colony, the limit of a subject's right was the mark of the highest winter wave. Ibid.

Upon the change of sovereignty that limit was regulated by the laws and policy of the new sovereign, and ordinary high tide became the limit and the line of separation between the proprietary rights of the city in lot E, and the rights of the United States as trustee of the embryo State. Pollard vs. Hagan, 3 How., 212.

The deed from the city to Gonzalez calls for "ninety feet in front on the bay;" and, in that call, is necessarily embraced all the property the city owned south of the north line of lot E for a width of ninety feet.

But it is argued that the call for "ninety feet in front on the bay" indicates aspect, rather than boundary. Between these constructions the one most favorable to the grantee must be adopted. Broome's Max., 129; Stewart vs. Preston, 1st Fla., 10.

But it is insisted in the answer that the calls of the deed are false and utterly inconsistent with the limits of lot E as defined on the map of the city. This is a fatal admission; and proves, as appellee insists, that the city's deed to Gonzalez was *intended* to fix a new south boundary to the lot conveyed, to wit: *the bay*, whether ordinary high-tide mark should be found north or south of the south line according to the plan of the Cabildo. The

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“allotment of Cabildo” was in other respects to be observed, and in order to ascertain the east and north lines of the lot, reference must be had to that allotment. The west line would be drawn from the extreme western limit of the bay line to the north line according to the “allotment of Cabildo” and the “new plan of the city.”

That the bay and the north line of lot E cannot, *according to the “allotment of Cabildo,”* be connected by a line of fifty-eight feet and ——— inches is of no significance, for distance always yields to boundary, whether natural or artificial. Doggett vs. Willis, 6 Fla., 482; Newsom vs. Pryor’s Lessee, 7 Wheat., 7; Cleveland vs. Smith, 2 Story’s R., 278; McPhaul vs. Gilchrist, 7 Ire., 169; Gilchrist vs. McLoughlin, 7 Ire., 310.

But a slight examination of the testimony will reconcile the apparent contradiction between the plan of the city and the calls of the deed.

The plan indicates the line of the bay in 1814. The deed on the other hand speaks with equal authority of that line in 1827. In 1814 (date of map) lot E was many feet from the bay line. In 1827, owing to the abrasion of the shore, it was washed and the south line covered by the bay. Jones vs. Johnson, 18 How., 150.

That the map was not regarded as a sure guide in fixing the front lines of the water lots in 1827 is proved by the resolution of the City Council of 19th February of that year, and the employment of a surveyor to fix the south line of lot E.

But we are not left to conjecture on this point. According to the scale of the map, lot E is over sixty feet in width, and yet in 1827 the City Surveyor, starting from the north line, reached the bay by running fifty-eight feet ——— inches.

Again, Touart proves that twenty-five years before his examination high-tide mark was ten or twelve feet from the warehouse which he worked upon; and Theodore Moreno, surveyor, proves that the south line of the lot, according to the calls of the city’s deed to Gonzalez, was thirteen feet five inches from the foundation of the house referred to by Touart.

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That the water line in front of lot E was found in 1866 to be distant 50 feet from the south line of the lot, according to the city map, only proves that the shifting sands of the sea have been accumulating since 1827 in front of the lot—a fact not at all irreconcilable with the abrasion which occurred between 1814 and 1827; for both accretion and attrition are largely influenced by artificial and temporary causes, such even as wharves and rafts.

It follows, therefore, that Gonzalez and those claiming under him acquired as against the city and its assigns a title to all the space between the north line of lot E and the bay, which was the utmost limit of the proprietary rights of the city.

To Gonzalez and his assigns the right of accretion inured, and as the bay receded, as it has done, his south line advanced with the receding tide. Angel on Tide Waters, 249, 250, 251.

Ordinary high-tide mark separated their property from that of the United States as trustee of the embryo State; and hence there could be no intervening space to which the city could assert title.

The city's deed to Gonzalez refers to no street on the south of lot E; and the resolution of the City Council of 19th February, 1827, shows that a permanent water front was considered a subject for future regulation. The report of the committee of the Board of Aldermen on 4th August, 1827, could not affect Gonzalez's rights acquired on the 19th February, 1827.

The open space between the bay and the lots was only intended to define the road along the coast, such a road as is referred to in Hagan vs. Campbell, 8 Porter, 9, and which is perfectly consistent with the right of alluvion in the proprietors of the lots over which it passes.

The city map is silent in regard to the real character of that open space; nor is it designated in any document anterior to the deed to Gonzalez as a street or quay; and yet the presumption that it was such, in the absence of opposing testimony, might arise. Such was the presumption in connection with

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other evidence upon which the courts acted in *Barclay vs. Howell's Lessee*, 6 Peters, 500; *Rowan's Ex'rs. vs. Town of Portland*, 8 B. Mon., 240. But the Report of the Land Commissioners, Executive Doc., page 75, fixes the character of the space. They say it is "a free passage along the coast without prejudice to the rights of alluvion and avulsion. The adjacent proprietors were entitled to the batture as an accessory which passed with the principal."

The covenant between the city and Knowles and Blount; the map laying off the water front into lots; the deed under which appellants claim; and the structure erected by them with the sanction of the city, estops the city from setting up a dedication of the open space as a street or quay, and also the appellants who claim under it. *Barclay vs. Howell's Lessee*, 6 Peters, 508. They cannot rely on a dedication to sustain a deed totally inconsistent with such dedication.

It was insisted by the appellants, in the court below, that the Act of the General Assembly "for the benefit of commerce" does not apply to lot E, because the 2d Section limits the privileges bestowed by the 1st to owners of land extending to low-water mark.

But that construction would make the act inoperative on the tide waters of the State, where commerce would be mainly benefited; for no riparian owner's boundary extends below ordinary high tide, whilst those on rivers extend to low-water mark.

The 2d Section has reference only to swamp lands, and was intended to guard against the rights of the State.

One part of a statute must be so construed by another that the whole may, if possible, stand. 1 Blk. Com., 62.

A saving totally repugnant to the body of the act is void. *Ibid.*

A mere false description does not make an instrument inoperative. *Broome Max.*, 136.

These rules of construction carry out the intention of the leg-

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islate, and give full force and effect to all the provisions of the act.

Third. The existence of a quay, street, or road along the shore between lot E and the bay, did not authorize the city to lay off the batture or shallows of the bay into lots and sell them to individuals to be enjoyed as private property.

On 4th August, 1827, the Common Council declared that “the space between the lots and the bay was reserved as *common property* for the use and benefit of the city, and *designed* for the erection of wharves and docks, the establishment of streets, and other *general uses* for the *common benefit*.”

“If the dedication of this ground to public use be established by the principles of the common law, it is of the utmost importance that the accumulations of the vacant space by alluvial formations should partake of the same character, and be subject to the same use as the soil to which it becomes united.”

New Orleans vs. United States, 10 Pet., 299; Geiger vs. Filor, 8 Fla., 325; Barclay vs. Howell’s Lessee, 6 Peters, 498.

Fourth. The appellants cannot justify the wrong of which the bill complains, under the grant alleged to have been made to Vicente S. Pintado by the Spanish Government.

First. There is no evidence before the court of the existence of such a grant.

The paper in the record purports to be a copy of a copy of a copy made on 18th of October, 1821, in Havana by an officer, who states he returned the original to the interested party, thus showing he was not its custodian.

In United States vs. Percheman, 7 Peters, 85, the court says: “A copy given by a public officer whose duty it is to keep the original ought to be received in evidence.” All the subsequent cases in which copies of Spanish grants were received in evidence, the copies were made by the custodian of the original. United States vs. Despline, 12 Peters, 654; United States vs. Wiggins, 14 Peters, 334; United States vs. Rodman,

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15 Peters, 130; United States vs. Despline, 15 Peters, 226; United States vs. Acosta, 1 How., 24.

But here we are offered a copy made by an officer who was not entitled to the custody of the original according to his own showing.

And again, he could not be entitled to such custody under the 2d Article of the treaty between the United States and Spain.

Second. The batture or shallow in front of the city of Pensacola was not grantable by Intendent Rameirez. New Orleans vs. United States, 10 Peters, 662, pages 724-7; Geiger vs. Filor, 8 Fla., 325; Opinion of Coms. Ex. Doc., 74-76; Strother vs. Lucas, 410, page 438.

Such a grant would violate the vested right of the public to free access to the bay from the foot of the street, the squares, and the road along the coast for business, comfort, and pleasure. And it was to guard these rights that the law in the Novissimo Recopilacion, B. 7, tit. 16, law 1, quoted in New Orleans vs. United States, 10 Peters, 726, was adopted.

Again, it would violate the vested rights of the front proprietors and impair the value of their property. Ibid., 720.

Such a grant by the Spanish crown is without precedent, and contrary to her colonial policy.

Third. The grant contains the limitation that it shall not operate to the prejudice of third parties; and yet it is urged as a justification of a wrong to every front proprietor, and the whole community.

Fourth. The grant of the batture was subject to a condition subsequent, to wit, the building of wharves and bathing-houses, and that condition has not been fulfilled, nor has there ever been an attempt at fulfilment.

The concession embraces six lots in the city of Pensacola, and 10,000 arpents of land, of which the batture of Pensacola is a part, as appears by certificate C.

Conditions are annexed to the concession of both the lots and the land, the language used being on condition of building on

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the one (lots), “and cultivating and improving the other”
(land.)

The character of the improvement to be made on the batture **i**s fixed by certificate C, which alleges the object of the **c**oncession to be the building of wharves and bathing-houses.

The concession states the conditions generally; certificate **C** fixes its precise character; and the title in form must be **c**onstrued with reference to them.

The concession, the survey, and the title in form are parts and **p**arcel^s of a regular and complete Spanish grant. Ex. Doc., 7-11.

In order, therefore, to ascertain the true legal import and **e**ffect of such a grant, we are not to look at disjointed parts; for “the law will judge of a deed or other instrument consisting of **d**ivers parts or clauses by looking at the whole, and will give to **e**ach part its proper office so as to ascertain and carry out the **i**ntention of the parties.” Broome Max., 126.

The form of the grant in *The United States vs. Arredondo*, 6 Peters, 691, was similar to this, and made by the same **I**ntendent. In that case the court said “the grant is in full property **i**n fee, an interest vested on its execution, which could only be **d**ivested by the breach or non-performance of the conditions.”
Page 353.

The forfeiture of Arredondo’s grant was saved by a partial **p**erformance, the fact that a complete performance was **p**revented by the treaty between the United States and Spain, **a**nd the additional consideration that its performance was not a **m**atter of interest to the United States.

Here, during a period of half a century, there was no attempt **t**o fulfil the conditions, though they were of the highest **i**mportance to the business and comfort of the community.

The ordinance of Morales allowed three years for the fulfilment of conditions. Art. 4, Land Laws, 2 vol., 235; *U. S. vs. Hughes*, 13 How., 1.

The limit allowed by the common law for the fulfilment of a

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condition where no time is specified, is a reasonable time, or at furthest the life of the party. 1 Hilliard Real Estate, 378, § 8.

This court is not clothed with the discretionary authority in the exercise of which the Supreme Court of the United States decided the Arredondo case and others. Nor are the conditions here, as they were in those cases, purely matters of interest to the United States, if any party, but their fulfilment was and is of vital interest to the business and comfort of an entire community.

Holding the grant absolute, and waiving the performance of the conditions, would for half a century have left the city of Pensacola without a wharf or bathing-house, unless erected with public or municipal funds, for private enterprise is expressly excluded by the terms of the grant.

Fifth. The grant does not purport to convey the soil of the batture, but only confers the franchise of building wharves and bath-houses upon it.

As between subjects the words of a grant shall be construed most strongly against the grantor; but in the case of a grant from the sovereign, it shall be construed most strongly against the grantee. Broome Max., 122-3.

In order to ascertain what is granted we must first ascertain what is included in the exception; for what is included in the exception is excluded from the grant. U. S. vs. Arredondo, 6 Peters, 741.

All the rights of the crown are reserved, and the chief of these was the property in the soil as the trustee of the public.

Again, the rights of the public, and even those of the city, to the extent of building wharves *ad libitum* with public or municipal funds, are excepted.

The grant of such a privilege was allowable under the laws of Spain. The King could authorize "building" in public places, provided, however, no one should be injured in his right thereby. New Orleans vs. U. S., 10 Pet., 726.

The franchise has been forfeited by non-user for fifty years.

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But if not forfeited, can it authorize the erection of ice houses and other structures, or, in a word, covering the batture with a town, as the grantee or his heirs propose to do?

Even the ownership of a ferry confers no right to build a bridge. 2 Hilliard Real Property, 41.

Sixth. The act of Congress, 23d May, 1828, was a final settlement of all claims arising under the grant.

The act confirms the grant to the extent of the quantity contained in one league square, or 5760 acres, being 3965 less than the grant called for, with the proviso that the residue shall be relinquished to the United States, and what was embraced in certificate C (the submerged land in front of the city of Pensacola) should constitute no part of the league square.

Seventh. That the claim to what is embraced in certificate C was barred on the 23d May, 1829. United States vs. Marvin, 3 How., 620; see 12 sec. act 23d May, 1828, 4 vol. U. S. Stat. at Large, 284.

Eighth. The claim to the submerged land embraced in certificate C falls within the principle declared in U. S. vs. Hughes, 13 How., 1, and ibid 4, that failure to take possession of land granted, or to assert a right thereto for 36 years, as in one case, or for 40 years, as is in the other, justifies the presumption of abandonment.

Here possession was never taken by Pintado, his heirs, or assigns. In 1826 he asserted his title before the Land Commissioners, and again for the last time before Congress in 1828.

Both applications were refused, so far as they related to the water front of Pensacola; and that refusal has been acquiesced in by Pintado, his heirs, and assigns, since 1830, a period of 38 years.

This suit does not rebut the presumption of such acquiescence. Blount and Knowles are self-constituted trustees, in no wise connected with Pintado, his heirs or assigns.

Fifth. That either as a riparian proprietor whose individual rights have been violated, and threatened with further violation,

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or as a front proprietor peculiarly injured by the infraction of a public and common right, appellee was entitled to apply to a court of equity for the relief for which his bill prays, and which the circuit court granted.

First. The appellee is a riparian proprietor asking for the abatement of a structure, and an injunction to prevent the erection of others, in violation of his rights under the Act of 1856 for the benefit of commerce.

The Act itself gives the right to proceed by bill in chancery; and the very nature of the rights conferred and to be protected renders that remedy indispensable.

The law gives the riparian proprietor absolute control of the space from ordinary high-water mark to the channel, to enable him to meet the wants of commerce in any way his interest and judgment may dictate.

He may design the space for such purposes as may require it to be kept open, and free from all obstructions, *e. g.*, as a landing-place for rafts. He may design one part for wharves, and another for warehouses; or he may choose so to exercise his rights as to enable him to accomplish all these objects at the same time.

Now, if an ice house or warehouse is built on water which he proposes to keep open or build wharves, ejectment is not an appropriate remedy.

Again, if the erection of such structures is threatened, will any common law action prevent the wrong?

The removal of the structure in the one case, and preventing the erection in the other, by a proceeding and decree like that in the circuit court, is the only adequate and complete remedy of the riparian owner.

Jurisdiction in cases like this is not a question of authority in the court, but simply one of precedent; and that is settled in this State by *Geiger vs. Filor*, 8 Fla., 325. The original bill in that case was to abate a nuisance, and an issue having been ordered, complainants amended their bill by presenting a case

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like this under the Act of 1856, which the circuit and supreme courts fully heard and determined on its merits.

Second. Complainant is a front proprietor, peculiarly injured and threatened with further injury, by the appropriation of the batture to private purposes as an incident to a road along the coast.

Barclay vs. Howell's Lessee, 6 Peters, 507; Geiger vs. Filor, 8 Fla., 325; Dixon vs. Irwin, 9 How., 10; 2 Story, Eq. Jr., 926-7, show that a street, and much less a road, along the coast, cannot authorize the erection of structures inconsistent with its use; and that a bill for the abatement or prevention of the injury is the appropriate remedy, either against the corporation or the agent who commits the wrong, at the instance of a party specially injured.

Third. The appellee is a corporator peculiarly injured by an abuse of its powers by the corporation of Pensacola, to the injury of all its citizens.

The agreement between the city and Knowles and Blount, and the resolution requiring the city attorney to institute suit against the heirs of Pintado, in connection with all the objections existing to the validity of the grant, create the presumption of an effort to unlawfully deprive the city of her water front.

First. No front proprietor was admitted as a party to the agreement.

Second. Blount and Knowles were self-constituted trustees of the "heirs of Pintado," whose names are not stated, and of the death of whose ancestors there is no evidence.

Third. Knowles was a self-constituted trustee, and Knowles offered, and by his vote carried, the remarkable resolution.

Fourth. The city attorney, contrary to his judgment, is required to oust the city in favor of a party who had not been in Florida since 1816, and make the city a plaintiff, when her just and legal position was that of a defendant in ejectment.

Fifth. The city attorney was virtually required to waive the statute of limitations; the force and effect of the decision in The

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United States vs. Marvin, and that of United States vs. Hughes; and to ignore the fact that the existence of the grant to Pintado was more than questionable; that if it did exist it was illegal, so far as it covered the batture, for want of authority in the officer who made it; that it was founded on conditions never fulfilled; that it was made without prejudice to the rights of the city; that it was a grant of nothing more than a franchise, and in terms subordinate to the rights of the city; and lastly, the settlement by the United States thirty-eight years ago, and by an act which fully protected the rights of the city and those of her citizens, so far as they were affected by the grant.

The map of the batture made pursuant to the agreement shows how vast was the injury contemplated against the public, and the front proprietors, of whom the appellee was one, and the city the largest, as the owner of the public squares in trust, and (to use her own language on 11th August, 1827,) “for the common benefit.”

The railroad was involved in the scheme to secure supporters, and foil accusation by an affectation of public spirit.

Injunction will be granted against corporations to prevent injury to others by an abuse of the powers granted to them. 2 Story Eq. Jr., §927; Rowan vs. Portland, 8 B. Mon., 232. And Barclay vs. Howell's Lessee, 6 Peters, 500, shows that the remedy extends to the agent employed to accomplish the wrong.

WESTCOTT, J., delivered the opinion of the court.

Pinney, in the court below, filed his bill against Geo. J. and Sevilla Alden, in 1866, alleging that he was the “owner of so much of lot E. in the city of Pensacola, as lies east of a line beginning on Rocova street ninety feet from Commendancia street, and running south to the bay;” that this lot was formerly the property of the city of Pensacola, and that on the 16th March, 1827, the city, in exchange for another lot, conveyed

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that *portion of lot E*, described above, to one Manuel Gonzales, from whom, by several mesne conveyances, Pinney derives title; that at the time said deed was executed by the city to Manuel Gonzalez, the southern boundary *of the lot was the bay*, and that he was entitled to all the rights and privileges of a riparian owner; among which he alleges are those of accretion, free access to the harbor from the lot, an unobstructed view, a free circulation of air, as well as the other privileges appertaining to a lot fronting on the bay.

Pinney alleges that in disregard of these, his rights, the defendants have built an ice house in the *shoal water*, directly in front of his lot, and about one hundred and fifty feet from the situation of the front door of his storehouse, which was destroyed during the late war; that they claim other parcels of the submerged land in front of his lot, upon which they intend to erect, or authorize the erection of, other structures, which will still further irreparably impair his rights.

He alleges further, that he and those under whom he claims, have been in actual possession of said lot E, and all the rights and privileges incident to a lot fronting on the bay, for a period of forty years; that during all this time and before, the beach and bay in front of said lot were free from obstruction until this ice house was erected.

The bill prays that defendants may be ordered to remove the ice house, and for a perpetual injunction against erecting other buildings, or *structures of any kind*, in front of complainant's lot.

The answer under the statute sets up, by way of demurrer, that the matters stated in the bill may be tried and determined at law, and that complainant is entitled to no relief in a court of equity. It denies, upon information and belief, that complainant is a riparian proprietor; avers that his lot extended south from Recova street only fifty-eight feet eight inches; that it never extended to or was bounded by the waters of the bay; but that, on the contrary, at the time of the execution of the deed of the city to Gonzalez, in 1827, there was a space of more than

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eighty feet in width between lot E and the bay; that said space had existed from time immemorial, and had been used as a street or highway; that Gonzalez at the date of his purchase, was restricted by a well-defined metes and bounds; that the lot was not bounded by the bay, and that complainant has no right to the soil under the waters of the bay, upon which the ice-house is constructed.

Defendant admits the construction of the ice-house, and allege that they are the owners of the soil upon which the ice-house is constructed, as well as other lots, upon which they claim the right to build other structures, by virtue of "a purchase from the city of Pensacola and the heirs of Vicente Pintado, deceased," and that said heirs held and possessed the aforesaid land by virtue of a valid Spanish grant.

After evidence and hearing, the relief prayed was decreed; and from this decree an appeal is taken to this court, by the defendants in the court below.

The case is here without any formal assignment of the grounds upon which a reversal of the decree of the court below is prayed, and the court is thus constrained to treat the case as it was argued by counsel.

Appellants urge that the demurrer was not disposed of in the court below, and that for this reason the case should be remanded, as well as that the demurrer was well taken and should have been sustained.

Under the statute of this State, the defendant is authorized to set up special matter by way of answer, and if in his pleading he prays the same benefit from it as if he had pleaded it or demurred to the bill, he can have the benefit of it in most cases at the hearing. There is a class of cases, however, among which are such as where certain objections are taken as to parties, where this objection must be disposed of *in limine*.

In the other case, and where the practice is to urge it at the hearing, it is presumed here, without any special allusion to the matter in the body of the final decree, that it was urged,

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and that it was considered by the court in arriving at its conclusions. In many cases, in fact in most cases, *ex abundante cautela*, it is usual to insert in the beginning of the answer that defendant prays the same benefit of the several special matters set up therein, in the same manner as if he had demurred or plead to the bill. Often, in this class of cases, the pleader has little or no confidence in this defense, and nothing further is said at the hearing. This would be an abandonment, and it is stated by the appellee, without express denial by appellant, that this demurrer was not urged at the hearing below. All this, however, is immaterial in this case. The objection here is, that there was adequate remedy at law, and we can consider this matter whether raised by demurrer or not. 19 How., 278. In this case, however, we know of no common law remedy or action which would at once prevent the erection of structures upon his land in the event complainant was a riparian proprietor, and this structure and the contemplated structure was an obstruction to the navigation, the case being that free access to the harbor is obstructed, as well as private injury, as stated by the bill. He might perhaps recover damages, but he should be entitled by the aid of the courts to prevent special damage occasioned by continued trespasses, if it is threatened, and he is a riparian proprietor. In case of this character, where an undisputed possession of forty years is alleged, and where in an appellate court the claim of title which complainant sets up to the *locus in quo* is met in argument, not by establishing or urging title in the defendants, or in those from whom their rights are derived, but by a simple denial of the extent of the boundaries of complainant, and of his alleged riparian proprietorship, the jurisdiction should attach. The principal defense made in argument here is, not that there was title in the heirs of Pintado, or in the city, but that with but slight allusion to the title of these parties, or attempt to sustain them, that the property of complainant was limited by well-defined boundaries, and was never bounded by ordinary high tides in calm weather.

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proprietors, too, under the Act of 1856, have a title in trust for the benefit of the public, (2 Story's Eq., 115.) This seems to be the only view consistent with the case of *Ex parte Pilon*, (8 Fla., 325,) upon this subject of jurisdiction. We are not disposed to establish a new rule, although it may be questionable. Even then, could the demurrer be available here, it should be overruled.

This leads us to the consideration of the case upon the proofs. The first question to be determined, is: Has the complainant proved that the "southern boundary of the lot" conveyed to Gonzalez on the 19th February, 1827, from whom he derives title, "was the bay," or that it extended to the line of ordinary tides in calm weather at that time? What may be the effect of the reservation of lot E for a market house and stores, as designated on the plan of the Cabildo, we do not determine, as no point is made of it by defendants, and we treat the case as though an absolute and proprietary right is in the complainant to whatever passed under the deed.

The question of boundary here is a fact to be determined by consideration of the whole evidence. The portion of lot E conveyed is described in the deed as "the easterly part of the market lot, where the flag-staff formerly stood, and marked by the city surveyor, ninety feet in front on the bay, and fifty-feet—*inches* in width, agreeably to the allotment of the Cabildo and the new plan of the city." This is followed by a covenant that Gonzalez, his heirs and assigns, shall forever enjoy peaceable and quiet possession of the premises as against the city and all persons claiming under it. This deed was executed by the mayor of the city by virtue of an ordinance passed on the 19th February, 1827, as follows:

Ordinance to carry into effect an arrangement with Mr. Manuel Gonzalez.

It ordained by the Board of Aldermen of the city of Pensacola, That on condition of Mr. Manuel Gonzalez conveying

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and delivering to the city of Pensacola the old market lot now in his possession, the mayor is hereby authorized to convey to the said Manuel Gonzalez the eastwardly part of the new market lot, where the flag-staff formerly stood, and marked by the city surveyor, ninety feet in front on the bay and fifty-eight feet—
inches in width, agreeable to the allotment of the Cabildo, and the new plan of the city.

It is apparent from the title of this ordinance that it was passed to consummate an arrangement previously made.

On the same day the following appears on the minutes of the Board of Aldermen:

Resolved, That the city surveyor be requested to survey and make an accurate plan of the building-lots, as they now stand, and also a plan of the original grants on the bay front, from the east corner of the market house to Villaseca's corner, in order to enable the City Council to determine on a permanent bay front and building line.

The subsequent action of the board of aldermen shows that this resolution was passed to devise means to stop encroachments by front proprietors upon an open road or street between the proper limits of their lots and the bay.

Agreeably to the plan of the Cabildo and the new plan of the city, the map referred to in the deed, lot E was contained within defined lines. It was bounded on the north by Recova street, on the east by Commandancia street, on the west by a street or space not named, and on the south by an open space between the south line of the lot and the water, for a distance of at least fifty or sixty feet, the lot being a parallelogram. This map, alluded to in the deed to Gonzalez in 1827, was made in 1814.

It is insisted that the call of the deed is for "ninety feet in front on the bay," and that this is a call for the water as a natural boundary; that it must control the call for fifty-eight feet—inches, which is a call for distance, and that the ref-

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ice to the new plan of the city is simply to indicate locality
and not boundary.

“It is a general principle that course and distance must yield to natural objects. The reason of the rule is, that ‘all lands are supposed to be actually surveyed, and the intention of the grant is to convey the land according to that actual survey;’ consequently if there are marked trees and marked corners, or other natural objects, distances must be lengthened or shortened and course carried so as to conform to those objects. It is conceived to be the general intention of the grant to convey the land actually surveyed, and mistakes in course or distance are more probable and frequent than in marked trees, mountains, rivers, or the natural objects capable of being accurately described.” 6 Fla. Rep’ts, 506.

While this is true, it is no less well established, that a plat of a town referred to as containing a designation of boundaries, fixes them as satisfactorily as any natural objects; and if in such case one natural boundary, a river for instance, is inconsistent with all the other designated boundaries, according to the map, the plan or map will control unless it appears satisfactorily that the natural call has not been inserted through inadvertence or mistake.

It is not correct, however, to conceive that the call for “ninety feet in front on the bay” is or can be nothing else but a *call for the water of the bay as a natural boundary*. These terms indicate aspect as well as boundary; for instance, in the second line of appellee’s brief they are used as indicative of aspect, and so are they repeatedly used in the record evidence embraced in this case. Independent of the other calls, the argument is at least as good to sustain the one position as the other.

These terms, therefore, must receive that construction and signification which is most consistent with the other calls and the evidence in the case. While the reference to the new plan of the city and the allotment of the Cabildo indicates locality, as was urged by appellee, yet we cannot sanction the view

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that it is to indicate *locality alone*, in the sense intended. This reference certainly gives us the northern and eastern boundary. The call is for "the easterly part of the new market lot, where the flag-staff formerly stood," and the other calls are only further descriptive of its boundaries and width. When we have found upon this plan the new market lot, we have certainly ascertained the eastern boundary of this lot; and so also have we in like manner the north boundary, for the north and east boundary of the lot sold to Gonzalez cannot be other than the northern and eastern boundary of the lot agreeably to the plan on this map.

This is the only method in which we can fix the north and east boundary of the lot; and this, too, seems to be the view of the appellee so far as the north boundary is concerned, for he claims in his bill, to own "*so much of lot E in the city of Pensacola as lies east of a line beginning on Recova street, ninety feet from Commandancia street,*" and Recova street is the north boundary of lot E, and a straight line.

In Barclay vs. Howell's Lessees, 6 Peters, 500, the deed called for the lot by its number as marked on the plan of the town, and bounded by Front street, the river Monongahela, and lots number 182 and 184. The court, in speaking of the effect to be given to the reference to the plan, say, "the plat of the town, which is referred to as containing a designation of the boundaries of the lot, fixes these boundaries as satisfactorily as any natural objects. So in this case, the northern and eastern boundary of the new market lot contain a designation of the boundaries of the property sold to Gonzalez as satisfactory as if natural objects were posted at each angle or termini.

We thus see that the northern boundary is a straight line of ninety feet, commencing from a point on Commandancia street, and running west on the southern boundary of Recova street, and we come now to ascertain the length of the eastern boundary. The deed in the first place restricts the whole body of the grant to the "*easterly part of the new market lot,*" and

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where is the authority to extend the boundary of the grant beyond the marked eastern boundary of lot E? But this is not all. The words of the deed are, "and marked by the city surveyor, ninety feet in front on the bay, *and fifty-eight feet—inches in width.*" Now if the plan of the Cabildo is to govern this eastern boundary, to reach the bay must be at least one hundred and ten feet or more. Here is a call for a southern boundary of ninety feet in front on the bay, which if these terms denote aspect makes a consistent whole, while if they indicate a water boundary, and the plan of the Cabildo governs, you extend a line to a distance of one hundred and ten feet, which the deed expressly says was marked by the city surveyor to be fifty-eight feet—inches. We must accept the consistent construction.

Again, it is urged that these apparent inconsistencies between the plan and a water boundary are explained, and the explanation is that the plan indicates the line of the bay in 1814, while the deed on the other hand speaks with equal authority of that line in 1827, and that in 1827, owing to the abrasion of the shore, it was washed, and the south line of lot E was covered by the water.

It has not and could not well escape the attention of the court, that while there is one witness examined in this case who testifies fully that no structure has been placed upon the shoal water in front of this lot between the year 1815, one year after the plan of the Cabildo, and the year 1866; and while there are others who must be acquainted with the position of the waters of the bay between 1815 and 1827, yet there is not a particle of positive testimony to establish an abrasion of the shore between 1814 and 1827. The testimony of Moreno shows that, according to the *scale of the plan*, the distance from the north boundary of lot E to the south boundary, as marked on the map, is sixty feet, while the deed describes it as fifty-eight feet — inches, and upon this difference a presumption is constructed that between 1814 and 1827, owing to the abrasion of the shore, the line of the water had enroached upon the south boundary of lot E,

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and that when the surveyor ran his line from the north boundary towards the south boundary in 1827, he struck the water at fifty-eight feet — inches, and thus the words "*in front on the bay*" indicate a water boundary. This is certainly a violent presumption in the absence of even the slightest particle of testimony going to establish an abrasion, or anything like a washing away of the soil, between 1814 and 1826; nor is the existence of even one of the artificial or temporary causes generally producing such results established, although it is alleged they may have existed. Besides, as the width of the lot was never marked on the plan of the Cabildo, and the surveyor, no doubt, run the line actually in 1827, and did not estimate the distance according to the general scale of the map, it is not very remarkable that there should be a slight difference between a line *actually run* by him in 1827, and an estimate *according to the scale* in 1866, especially when upon a reference to the plan of the Cabildo a difficulty in determining the initial and terminal points of the line with entire certainty is very apparent.

While the testimony of Touart, in the record, who seems to have known nothing of the metes and bounds of the lot, is not as positive or explicit as it might, yet from his testimony, uncontradicted, it might be admitted that in 1842, (a date more remote from the deed than the date of the plan,) the water did strike the south boundary of the lot, and still it is not seen how this could make the appellee a riparian proprietor in 1866, or Gonzalez in 1827, but even if that was the date in issue, we could not come to an affirmative conclusion upon the testimony of this witness, with such other contemporary proof as in this case. A reference to the almost contemporary proceedings of the board of aldermen, and the report of the commissioners in 1825, leaves no room for a reasonable doubt that in 1827, at the date of the execution of the deed to Gonzales, there was a road or open space between the lots of the city fronting on the bay and the water. The commissioners in 1825, in speaking generally of the lots fronting on the bay, refer to "a public road on the beach," and

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there was in 1866 about the same distance from the south boundary to lot E to the water as there was in 1814.

We have, in the record, the following report of a committee of the board of aldermen, of the date of August 4th, 1827:

“The committee who were directed by resolution of the 16th July ‘to examine the size and dimensions of the water lots,’ and also to inquire into the ‘expediency of establishing a building line on the bay’ beyond which no building should be erected, and declaring a water street in front of said line; and likewise what disposition should be made of the space in rear of the building line; and further, if any encroachments have been made by persons who have built upon water lots, how they are to be disposed of, beg leave to report:

“Your committee being apprised of the difficulty and importance of this subject, with the deep interest that is involved in the questions that may grow out of the investigations of the rights of the corporation and those of individuals, have bestowed upon it a careful and attentive examination so far as their means of information extended. It is apparent, upon the English plan of Pensacola, *that the water lots were never designed to extend to the margin of the bay; the same thing is equally clear upon the Spanish plan.* Both these plans show clearly and distinctly that the space between the water lots and the bay was reserved as a common property for the use and benefit of the city, and designed for the erection of wharves and docks, the *establishment of streets*, and other general uses for the common benefit. If this space between the true lines of the water lots and the building line in front of the city be the *common property of the corporation*, every encroachment upon it is an injury done to the common interest, and should be subject to its consequent damages.

“To carry into full effect the *plan of the city*, and to maintain the ground already contended for that the bay should be kept open for common use and common benefit, Mansfield street according to the English, Zaragossa according to the Spanish plan, was made the *base of the water lots*. Agreeably to the first plan,

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the water lots were laid out 80 feet front, and extending towards the bay 170 feet, with garden lots corresponding to each of 105 by 208 feet. Those grants by water lots were made by the British government in the year 1765. After the Spaniards became possessed of the city, nearly all of the English titles to the water lots were forfeited, and consequently became Spanish property. The Spanish adopted the same plan of basing the water lots upon Zaragossa street, but at least some of them did not extend towards the bay. If these water lots had extended from Zaragossa street to the water's edge, or from the margin of the bay to Zaragossa street, no claim could be set up by the corporation for *the space between the true lines of the lots and the building line*, as already alluded to; but as the facts of the case are, so will be the result. It appears very clear to your committee that this space belongs to the corporation as an interest in common to the inhabitants of the city, and that all that can be asked by the individuals claiming water lots is the full extent of their lots according to their respective grants; for by what rule of right can an individual ask and claim that which has not been granted to him, or sold to him, nor for which he has paid his money? The zigzag appearance of the present building line on the bay is of itself sufficient to convince your committee of the necessity of establishing a street and building line on the bay, beyond which no building shall be erected."

The committee, then, after recommending a building line, further advise that the space between the true lines of each water lot, according to its grants, and the building line referred to, be paid for by the individuals owning back of it in improvements to be done upon the line of Water street, &c.

With this report an ordinance is submitted to accomplish the end desired. The mayor disapproves the ordinance, but he affirms in what he states the general views of the board of aldermen as to a street on the bay front.

The memorial, in the record, is a protest against any action to *straighten* the road along the bay. Its language is, that such

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action will be “extremely injurious to the public by straightening the wagon road, and greatly embarrassing the most commercial part of the city.”

It needs no argument to show that the fact that the southern boundary of lot E reached the water in 1827, is inconsistent with these almost contemporary expressions. They allude to no abrasion of the shore, and no such changes in the line of high tides as appellee contends for. It would be little less than absurd for the city to be urging a permanent line for a bay front, with an open space between the lots and the bay, and yet be selling lots with a water boundary, and giving a covenant for a quiet and exclusive possession of grounds which were, in their judgment, dedicated to the public.

A complainant seeking relief in a court of equity must produce “that degree of certainty, based upon appropriate evidence, either positive or circumstantial, which creates a moral conviction in the mind of the court” that the facts are as he alleges, or he cannot have the relief he asks. 7 Fla., 144-5.

Our conclusion is, that the complainant has *failed to prove* that Gonzalez was a riparian proprietor in 1827, or that complainant in 1856 had a water boundary, and this whether the act of 1856 vests the rights therein conferred upon parties other than “those owning lands actually bounded by and extending to low water mark,” or not, a question which is not determined.

The case made by the bill is that of a riparian proprietor strictly, but being most ably argued in other respects, by both counsel, we consider it in those respects.

This street or space between the southern boundary of lot E being subject to the use of the public, it is insisted that the erection of this structure, at the point designated in the water, is such an interference with this right of the public and his right, as to vest the appellee with an equity to have it removed. Without determining any question of jurisdiction in the event it was held that it was an interference with any public right, it is enough to say that we cannot see how, in fact—and that is

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the point to which our inquiry must be directed—the **construction** of this house at a point considerably distant from the road **or street**, and not immediately bordering on it, can interfere with **any** right which the individual may have to the use of the road, **or that** his property is impaired or injured by any misuse of the **road**.

If the construction of this building, at this distance from the **south** boundary of the street or road, produce such results, then **it is** not perceived what could modify the principle when **buildings** are construed within the same distance north of the **street**.

Again, it is insisted that, as a front proprietor, he is entitled to **have** this obstruction removed. Whether the title to the soil **under** the water between the southern boundary of the road or **street** and the channel of the bay is in the heirs of Pintado, or **whether**, not being in the heirs of Pintado, the dedication of **this** road or street (bounded as it is with the water of the bay) **to the** use of the public anterior to the incorporation of the city, **under** the circumstances and at the remote period of its **dedication**, vests the title to this passage or road in the city upon its **subsequent** incorporation, or whether the city has title to this **submerged** soil under the acts of Congress, or whether, having **title** to the soil of the passage or road, and being thus the owner **of lands** “actually bounded by and extending to low water **mark**,” within the meaning of the statute, the city by virtue of **this** ownership and the act of 27th Dec., 1856, became vested **with** title to all the land covered by water as far as to the edge **of the** channel, with the right and privilege to build wharves **into** the bay, and do whatever else may be for the benefit of **commerce**, are all questions which it is unnecessary for the **decision** of this case to determine; and this court would be justly **subject** to censure should it volunteer the results of its **investigation** of these subjects.

Whatever rights Pinney has in reference to the space from **the** channel to the southern boundary of the passage along the

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coast, do not result from any *title to the soil in him*, and these rights, therefore, whatever they are, must exist independent of title; and whether the title be in the city, in the heirs of Pintado, or in Alden, the rights of Pinney are the same.

Wherever the title to this soil is, whether it be in the city, or the heirs of Pintado, or in the State, it cannot, under existing laws, be used in any event to obstruct navigation or commerce. If the grantees of the State hold it, it is coupled with this trust, and if it is put to such use, or such use is threatened, there are circumstances under which complainant can properly seek a court of law or equity to redress injuries. If this ice-house, or any other structure which defendants intend to construct, will be an obstruction to navigation, a hindrance to commerce, or impede or transgress the rights of the public in this respect, the remedy to correct this public evil, while it exists in the State courts, is not at the suit of an individual citizen. He can only seek a court of law or equity in cases of special damage to himself. Such special damage, in case of a public nuisance, must be beyond and in addition to that which falls alike upon all, and he must seek relief in a court of law or equity, as the nature of his special injuries and the remedies for them should determine to be appropriate. 9 Howard, 28; Aug. on Tide Waters, 119, 120, 121.

In this view, what character of case have we here presented upon the pleadings and proofs? The rights which are claimed to be affected are “the rights of accretion, free access to the harbor without let or hindrance, an unobstructed view, a free circulation of air, as well as all the other privileges appertaining to a lot fronting on the bay.”

The particular act or grievance set forth is, that defendants have built an ice-house in the shoal water directly in front of his lot, about one hundred and fifty feet from the point where was situated the front door of his storehouse, which structure was destroyed during the war, and that the defendants claim other parcels of the submerged land in front of his lot, upon which it

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is intended to erect other structures, which will still further irreparably impair his rights. The answer admits the erection of the ice house, and claims the right of erecting buildings upon the other lots in front of the lot of complainant, and a reference to the deed and map in the record shows that the other lots claimed by Sevilla Alden occupy about the same relative position to the property of Pinney as to the one upon which the ice house has been constructed.

The erection of this structure by defendants in a mark of title and of exclusive enjoyment. A mere question of title is one which a court of equity should not try. 19 How., 278. Beyond the simple erection of this structure there is but little evidence as to the character of the structure. There is nothing but the deed, which gives its dimensions. The *individual* at common law has no right, independent of the question of injury to himself, to have such a structure removed. Such soil was the King's, and he could demolish or seize the structure, the only limitation upon his authority being that in case it was a public nuisance the crown could not license it. Subject to whatever modifications this principle may have undergone by virtue of the legislation of 1856, it is presumed the State may proceed, as a general rule, in like manner by information or bill.

All obstructions to navigation not occasioned by misfortune or inevitable accident, and without any fault on the part of the owner, and which are not authorized by the Legislature, are public nuisances, and as such, subject the authors to indictment. Russell on Crimes, 274. Yet what is *in fact* such an obstruction to commerce is not so clear. Buildings in the waters of navigable bays are not *ipse facto* nuisances. Whether they are so, is a question of fact, to be determined in each case, and when especial damage is proven, an action on the case for such particular damage may be maintained by the individual. 1 Hill, So. Ca., 365; 3 Dowling, Pr. Cases, 61; 4 Watts, 437; 4 H. & McH., 540; 6 Pick., 94.

It is also true that a court of equity may interpose by injunc-

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tion in cases of alleged apprehended irreparable mischief; but there must be something more than a speculative injury to invite its preventive and corrective power. 6 Pick., 94; 21 Pick., 344; 9 How., 10. Were the complainants in the court below riparian proprietors, with the peculiar incidents attaching to that property under the statute, we have seen that the expressed intention of further trespasses and injuries, with the other circumstances of this case, among which is a possession of lot E for forty years, would be sufficient to give a court of equity jurisdiction. 12 Peters, 95. But this is not the case here. There is no right of accretion in Pinney to be disturbed. Should it clearly appear that free access to the harbor was obstructed, this would not of itself give him a standing either in a court of law or equity, unless he presented a case of special damage, and then the nature of the threatened injury would determine the jurisdiction.

The claim of an unobstructed view and free circulation of air cannot prevent the building of structures at this distance, and there is no such case of obstruction here as comes within the authorities. There is no evidence in this record which enables the court to know anything of the distance of the channel from this house, and no obstruction to the navigation of the bay is proved.

It is not made to appear that appellee has suffered any such special or irreparable damage, or that any injury is threatened, which would call for the intervention of a court of equity. 21 Pick., 344; 9 How., 27; 12 Peters, 91; Ang. on Tide Waters, 120-121; 19 Ves., 616.

If, independent of the question of riparian ownership and the requirements of commerce, the complainant has a right to have this structure removed, and to prohibit the erection of "any other structures," then even wharves, which facilities commerce, would be a violation of this right. Ang. Tide Wat., 196-197. The bill should have been dismissed upon the hearing.

It is therefore ordered, adjudged, and decreed, that the decree

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in this case is reversed and set aside, and that the cause be remanded for further proceedings, in accordance with this opinion.

SIMEON N. FREEMAN, APPELLANT, vs. HENRY TIMANUS, APPELLEE.

1. Where a bill is taken *pro confesso*, and a final decree is passed under the statute, an appeal lies to this court under the practice in this State, and in all cases such an appeal opens for the consideration of this court the record prior to the default.

2. Where A, claiming possession of real estate, institutes a possessory action at law against B, who is in possession under an agreement between them, which if set up in the action at law is a good defense, a court of equity will not enjoin the proceedings, but leave the party to make his defense at law.

3. A court of equity will not entertain a bill where the plaintiff in possession seeks to enforce a merely legal title to land, without any supervening equity.

4. Where there is no equity in the bill, or the case made shows a plain remedy at law, this court, in an appeal of this character, should direct the bill to be dismissed, though these questions are not raised in the pleadings.

SUPPLEMENTARY HEAD NOTES.—RANDALL, C. J.

1. Orders made in the progress of a cause should appear in the record; the Supreme Court, on appeal, cannot presume that an order, no evidence of which appears in the record, was made by the circuit court.

2. The principle that "the jurisdiction of any court exercising authority over a subject may be inquired into in every other court, when the proceedings of the former are relied upon and brought before the latter by the party claiming the benefit of such proceedings," is a rule of evidence, and is not in the nature of appellate or supervisory power.

Appeal from a decision of the Circuit Court sitting for Nassau county.

Simeon N. Freeman vs. Henry Timanus—Statement of the Case.

Statement of the case, prepared by Chief-Justice Randal

A bill was filed by Henry Timanus, complainant, appellee against the appellant in the circuit court of Nassau county, which complainant alleges that he is the owner in fee simple certain lands and tenements in the city of Fernandina, known lots numbers one, two, seven and eight, in block thirty-six, having purchased the same from the Trustees of the Florida Railroad Company on the 19th day of January, 1860; that ever since his said purchase he has been the *bona fide* and absolute owner, and as such now holds possession thereof; that the defendant claims to have an interest in the premises by reason of a purchase of said premises "under a certain confiscation sale had by and under a decree rendered in the United States District Court in and for the Northern District of Florida, in the month of _____, 186-, and also by reason of a certain tax sale had on the 13th day of February, 1865, by the Direct Tax Commissioners of Florida, under an act of Congress, being an act for the collection of direct taxes in insurrectionary districts within the United States."

That the said confiscation sale referred to was illegal and void in this: that complainant was not a party to the proceedings; that he was never notified or summoned to appear; that no jury had been empanelled to try the issue, and that said confiscation could not be had without complainant first being tried and convicted of treason; that no indictment or trial was had in said United States court against him: "that the said confiscation referred to is a gross fraud, and altogether illegal and void under the Constitution and laws of the land, and defendant was a party to and to said fraudulent and illegal proceedings, and therefore did not and could not obtain any title or interest in said premises which would entitle him to the possession thereof." That at the time the pretended confiscation took place in the United States District Court there existed a civil war between the United States and the late Confederate States of America, of which

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Florida was a part, "by reason whereof the civil jurisdiction of the United States within the State was suspended and inoperative, and the decree of said court confiscating the lands of complainant was absolutely void."

The bill further charges that the tax sale of said premises by the Tax Commissioners on the 13th February, 1865, was also a fraud against him, and that the proceedings thereunto had by the said Direct Tax Commissioners were altogether illegal, because of the existence of the civil war between the government of the United States and the late Confederate States, and the authority of the United States government to enforce its revenue laws at that time was suspended and inoperative, and the sale was illegal and void; that at the time the United States Tax Commissioners assessed and levied the direct tax of the United States on said premises, and sold the same for said taxes, the civil authorities of the United States were not established in Florida, nor in Nassau county, and that the military authority of the United States was not fully established through said State or county, or through any county in the State, and the acts therefore of the tax commissioners in assessing, levying, and selling the premises were against the provisions of the direct tax laws, and therefore absolutely void and of no effect.

That the tax levied upon said premises under said act of Congress was otherwise unconstitutional and unlawful, because the direct tax upon the State of Florida levied by the commissioners was not in proportion to the census of the several States, but much higher in Florida; and besides, fifty per cent. was added over and above the actual proportion levied on said State, by reason whereof said sale was void. That there was no legal assessment, the pretended assessment being made by the only two of the Board of Tax Commissioners which was not authorized by law, "and in consequence of which said assessment, together with the sale made thereon in June, 1863, was afterwards set aside by the Board of Direct Tax Commissioners under and by the direction and advice of the government of the United

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States.” That complainant had no notice of any assessment or levy of said tax, and no legal notice of the sale of said premises as he should have had under the law, and that the sale was not had in pursuance of any legal notice whatever. “That there was a great fraud perpetrated upon complainant by defendant, the tax commissioners, and other bidders at the said tax sale, in this, that there was a connivance between them to undersell the premises of complainant, contrary to law and against the morals of our community.” That the property was assessed at \$1,650, and sold for less than two-thirds of its appraised value, to wit, for \$40 only, which was contrary to law. That the entire direct tax, inclusive of costs, &c., charged against his property in Fernandina, was \$161, which was levied on all his lots, (which included a large number of other lots), and on the sale previously had by the commissioners on the 27th and 28th of December, 1864, and the 2d and 5th of January, 1865, of other lots than the premises in question, the sum of \$525 had been obtained, which was more than enough to pay the entire tax charged against his property, and the sale of these premises, therefore, was absolutely void. That the money obtained by the commissioners from the sale of his property was never paid into the Treasury of the United States, greatly in fraud of the government as well as the complainant. That said lots one, two, seven, and eight, in block thirty-six, were sold together, whereas they should have been sold separately as required by law. That the acts of the tax commissioners in apportioning the tax, the levy, the order of sale, and advertisement were all had in the city of Washington instead of in Florida, which were against the express provisions of the statutes; and finally, the act under which said property was sold is otherwise in conflict with the fundamental law of the land, and the proceedings under said act were otherwise irregular, illegal, and fraudulent, all which was well known to said defendant at the time of both said sales, the confiscation sale and the tax sale. That the defendant at the time of the tax sale was in possession of the premises under the

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confiscation title, and was therefore bound to pay said direct taxes charged, and his buying in the property at said tax sale, and thereby obtaining a tax title, was illegal and fraudulent, and his tax title worthless.

That on the third day of November, 1865, complainant and defendant entered into an agreement and understanding, that complainant should occupy the house and premises in controversy, subject to the legal rights and interests which either of said parties may have in and to said premises, to be determined by the courts of the land; viz., that on or about that time several former owners of lots in Fernandina which had been sold by the said Direct Tax Commisisoners under the act of Congress referred to, among whom complainant was one, had commenced or were about to commence proceedings against other tax purchasers in other cases, to test and try the validity of said sales and it was then and there understood and agreed upon that said complainant and the defendant should wait and abide the final decision of the courts as to the validity or avoidance of the tax sales in Fernandina, and in event that the final decisions should be in favor of the tax purchaser, that complainant was to pay defendant a resonable rent, to be determined after the final decisions, by and between complainant and defendant, and under this agreement and understanding the complainant has ever since occupied said premises, awiting the final decisons of said courts in those cases already commenced and pending, at the time of filing this bill, before the United States Circuit Court for the Northern District of Florida.

And the complainant charges that the defendant in disregard of his agreement, on the 31st of July, 1867, demanded payment of six hundred dollars of rent, or the delivery to defendant of the premises, and threatened in case of refusal to pay or deliver possession, "to invoke the aid of the proper authorities in the matter," and on complainant refusing to comply with such demand, the defendant, on the 5th day of August, 1867, made complaint against him, as his tenant, before W. H. Johnson, a justice

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of the peace, for the unlawful withholding against his consent the possession of said premises and thereby obtained an order from said justice against complainant to forthwith remove from said premises, or to show cause why such possession should not be delivered up to said defendant, all which actings and doings are contrary to the express understanding and in violation of the agreement by and between them, and contrary to equity and good conscience, &c.

The bill prays "that both the sales of complainant's property may be declared void; that the defendant's title in said premises based upon said fraudulent and void sales may be set aside, and also be declared void," and also prays a temporary injunction against said defendant to stay all the proceedings in law already commenced before said justice of the peace, and to enjoin him and them from all acts of interference with complainant's said property and the possession thereof, and from transferring and disposing of his said confiscation title and the said tax sale certificate, and upon the final hearing, a perpetual injunction.

The bill was filed on the 12th August, 1867. On the 27th September, an answer was filed, which was signed by defendant's attorney, but not sworn to.

The following endorsement, without date, appears on said answer: "Ruled out, as not being entered, filed subsequent to the order of the court, or properly sworn to. Th. T. Long." The answer being thus disposed of, on the 28th day of January, 1868, a final decree *pro confesso* was made to the effect following: "The court being fully advised in the premises, do find that the plaintiff has title and is the owner of the lots numbers 1, 2, 7, and 8, in block number thirty-six, in the city of Fernandina, and that both the confiscation sales of the plaintiff's said property to the defendant heretofore had by and under a decree of confiscation rendered in the United States District Court for the Northern District of Florida, and the tax sale of the plaintiff's property on the 13th day of February, 1865, by the United States Direct Tax Commissioners of Florida, to

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said defendant, were all and singular void, and that the law and equity in the premises are all in favor of the plaintiff."

"It is further ordered, adjudged, and decreed, that defendant's title set up and claimed in and to plaintiff's said premises by reason of said confiscation and tax sale, are hereby declared void, and of no binding force; and it is further ordered and decreed that henceforth the defendant, his servants, attorneys, his agents, and his heirs and assigns be perpetually enjoined and forever forbidden to proceed in the proceedings at law hitherto commenced."

The defendant was present at the rendition of this decree and excepted to it.

An appeal is now prosecuted to this court by the defendant, and the grounds upon which a reversal of the decree is prayed are as follows:

That the court could not obtain jurisdiction in the matter by enjoining the proceedings of the court below, that had and was exercising jurisdiction of the matter in controversy, in accordance with the laws of the State.

That portion of the decree of the court relating to the title of property was erroneous, for the reason (as will appear from the evidence of the plaintiff) that plaintiff was the tenant of defendant, and could not, therefore, dispute the title of his said landlord.

The court erred in deciding that there was no answer on file, on the ground that the jurat to the answer on file was defective; complainant objecting to said answer only in that particular.

The court erred in subsequently ruling that there was no answer in, after granting thirty days in which to amend or file answer, said answer originally filed having been sworn to anew and filed by defendant within said thirty days.

The court erred in refusing defendant permission to amend the jurat to his answer so as to conform to the rules and practice of the court.

The court erred in decreeing on the title to the property in-

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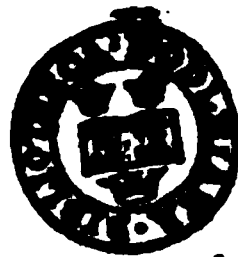
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olved, when the original suit which the court was prayed to enjoin was only for possession.

The court erred in granting a decree as confessed, and permitting complainant to proceed *ex parte* to a final decree.

The court erred in making a decree which virtually annuls and sets aside a former decree of the United States District Court for the Northern District of Florida, and also a certificate of sale from the United States Direct Tax Commissioner.

Bolling Baker and R. M. Smith for Appellants.



J. P. Sanderson for Appellee, submitted in brief.

1. Exception is to the court below taking jurisdiction of the case.

It is the province of a court of chancery to stay proceedings at law and take jurisdiction, when there are equities existing between the parties which can not be made available at law.

The equities in this case grew out of the contract set up in the bill, explained by the averments of its purposes and meaning as construed by the parties.

The principle is fully established, that the jurisdiction of a court exercising authority over a subject, may be inquired in every other where the proceedings of the former are relied on and brought before the latter. Elliot vs. Pierson, 1 Pet 340; 3 How., 750. This case approves and affirms the case 1 Peters, 340.

tion has no application to this case. The facts alleged do not exist, and are not pre-

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ground for moving to set it aside. 1 Dan. Ch., Ed. 1865, p. 505, 745—note. There was no jurat, no answer on file, hence nothing to amend. Answer had been stricken out. 1 Dan. Ch., Ed. 1865, 747, note 1; *ibid.* 745, note 2, and *ibid.* 503, notes.

4th Exception. The facts as shown by the record sustain the ruling of the court. The answer having been stricken from the file in the cause and not refiled, there was no such paper in court; but even the jurat of defendant to his attorney's answer was made thirty days after the time had expired within which defendant had leave to file his answer. The record does not show that any further application was made for leave to file answer or open decree *pro confesso* which had been taken at rule day in November, while the jurat of defendant was made to the attorney's answer in December.

5th Exception can not be considered as having any force. The record does not show that any application was ever made to the court for any such purposes, and if there had been, the court could not have allowed it. 1 Dan. Ch., Ed. 1865, 505, 506, note 1.

The decree was regularly taken at rule day in November, at the time prescribed by the rules. No application, as appears of record, made to vacate or set aside the decree *pro confesso*. It was made absolute. The court had no alternative. Ch. Rule 18, and Thomp. Dig., 457.

On an appeal from a final decree, based on a decree *pro confesso*, the party in default is estopped from all inquiry into the proceedings subsequent to the default. Only that which has been done prior to the decree *pro confesso* is open to examination before the appellate court. *Betton vs. Williams*, 4 Fla., 11 and 15; *Megin, vs. Filor*, *ibid.*, 107.

By the default, all the allegations properly made in the bill are confessed, and the allegations thus admitted are sufficient to sustain the decree.

Exceptions 6 and 8 are taken to proceedings subsequent to the decree *pro confesso*, and are not open to examination. If they

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were, there is no error presented by either of them. The titles are set up in the bill under which both parties claim, and brought before the court, and there is nothing upon the pleadings that show they were not rightfully there.

7th Exception. The record contradicts the assumed fact on which the exception relies for error. The record shows and counsel admits, that he was present at the final hearing, and prayed an appeal in open court. The facts not existing, the exception falls.

8th Exception. There is no force in this exception. The bill alleges that, in the case of confiscation, there was no service on appellee, and that he had no notice of the institution of the suit or proceedings in the U. S. Court; that he never appeared or had his day in court; and the authority in 1 Peters, above cited, is ample to cover this exception.

The record does not contain sufficient to enable this court to pronounce such a decree as the court below ought to have done, should it proceed to do so, or to determine whether the court below erred. Are the evidences of title-deeds, or contract, or other evidence so placed on the record as to authorize this court to regard them?

The rule of this court prescribes what is necessary to be done. Each document offered in evidence on the trial, must bear the evidencé of having been read on the trial, as prescribed by the rule, or the court will not consider them; and it is not the fault of the appellee if they are not, nor can such defects operate to his prejudice. When they are wanting, the plain duty of this court is to affirm the decree.

The same rule applies here as in case at law. The party excepting must at law, at his peril, place so much in his bill of exceptions as show the court did err to his prejudice. *Proctor vs. Hart*, 5 Fla., 468.

To apply this principle to a chancery cause, the appellant must, at his peril, see that his record contains all that is essential to enable this court to ascertain the errors of the court below, if

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any, and the facts necessary to enable the appellate tribunals to correct them.

There is nothing in this record to enable this court to ascertain, and correct any error, if any exist, and the decree should therefore, be affirmed.

J. P. ANDERSON.

Att'y for Appellee.

WESTCOTT, J., delivered the opinion of the court.

This is an appeal in Chancery entered after a final decree based upon an order taking the bill for confessed in the court below. The statute of 1853 allowing appeals from interlocutory orders does not change the rule laid down in this court in the case of *Betton vs. Williams*, 4 Fla., 14, as it expressly provides that an appeal entered after final decree shall bring up the interlocutory order for review, and that the postponement shall not be held as acquiescence. It was held by this court in the case mentioned that such an appeal could not bring before this court the proceedings in this cause anterior to the default upon which the order taking the bill for confessed was based, and it is only to that extent that we open the record in this case. There is however, this distinction between this case and the case of *Betton vs. Williams*. In the last case, after the demurrer was overruled, the case was abandoned, and there was no appearance at the hearing or exception to the final decree. It passed by default. Here there was no abandonment but appearance at the hearing and exception to the final decree. 25 Wend., 250.

It is true that the proceedings are ex parte after the entry of the order that the bill be taken *pro confesso*, but the decree under the statute is required to be such as is "proper," and consequent from the matter of the bill, and in making which there is necessarily the exercise of a judicial judgment, the plaintiff not being allowed to take such decree as he can abide by. 2 Smith's Ch'y Practice, 24; Thomp. Dig., 457.

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is unnecessary in determining this case to say whether the appearance at the hearing and exception to the final decree modifies the rule announced in the case of Betton vs. Williams, or do we express any opinion upon that subject, or upon the regularity or propriety of the interlocutory order in this case striking out the answer.

The appeal in this case bringing before this court the record prior to the default, the bill is open for inspection, and if upon the face of the bill there is no equity, or there is a plain and adequate remedy at law, the case must be remanded with direction conformable to that view. It may be urged that no such objection being made in the pleadings or presented in the decree of the Chancellor, this court cannot consider them. Such, however, is the practice of appellate tribunals in England, and such is the practice in the Supreme Court of the United States. 1 Phil., 399; 12 Ired., 231; 19 Howard, 278; 8 B. Mon., 137.

The rule should certainly prevail in cases of this character. The case as stated by the bill is briefly as follows: Each party, plaintiff and defendant, claim title to certain real estate. There are suits pending in the courts of the United States which it is thought involve the questions upon which their respective rights depend. The plaintiff in actual possession, and who claims both possession and property, and the defendant not in actual possession, but who claims the right of possession as well as property, makes an agreement that plaintiff shall retain possession without prejudice until the matter is determined by the United States Circuit Court in the cases pending in that court, and if the questions are determined against him he agrees to pay a reasonable rent, to be determined by the parties after the decision of the circuit court. It is alleged that in violation of this agreement the defendant, before these questions are decided by the circuit court, claiming that the relation of landlord and tenant exists between them, institutes his action in a magistrate's court to recover possession upon the de-

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fault of his tenant (which he alleges plaintiff to be) in the payment of rent which he states is due, whereupon this bill is filed. It describes the title of the plaintiff, as well as the title of the defendant, sets out the agreement for possession in the plaintiff as above described, and its violation by defendant, and prays that defendant's title be set aside, and for a perpetual injunction against the defendant, his heirs, and assigns, restraining them from ever setting up any title or claim in the property.

Upon the case made by the bill, plaintiff's remedy in the possessory action is to show for cause the agreement under which he is in possession, and taking the case as he states it, it is a plain and adequate remedy at law. Thomp. Dig., 398.

Without determining any question connected with the decree of the District Court of the United States, or the tax sale, it is evident that under this agreement as described in the bill, plaintiff has no more right to come into a court of equity to settle the question of title, than has defendant to seek a court of law to establish his asserted right of possession. They have agreed to abide the decision of another tribunal. The agreement as stated in the bill is not that defendant shall remain in possession permanently without a payment of rent, but that he shall remain in possession until the cases are determined by the circuit court, and in the event the decision is against him he shall pay such rent as is then agreed upon. If the decision should be against him, and he should make default in payment of the rent agreed to be paid, a right to institute the possessory action would accrue to defendant. While this is the agreement, the prayer of the bill is for a perpetual injunction.

We must assume that the agreement mentioned in the bill is executed so as to be available at law to meet the possessory action. This being so, the parties should be left as they have placed themselves by their agreement, which prohibits this court from settling the question of title, as well as the magistrates' court from adjudicating the question of possession.

The facts claimed as constituting the equities in this bill are

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ased principally upon the agreement which it sets up, and that agreement, if it is as described, is a good defense at law to the possessory action, which does not involve the title.

An injunction to stay proceedings at law is not granted where the injury complained of is plainly remediable by the court of law, as in this case. Story's Eq., § 875; Mit. Eq. Pldg., 127, 128, 131.

We cannot view the case as one in which the agreement has been rendered inoperative by the act of the parties, among other reasons, because the plaintiff claims the benefit of it in his bill. But if it could be so viewed it leaves the bare question of title, and a court of equity will not entertain a bill where the plaintiff in possession seeks to enforce a merely legal title to land without any supervening equity. 19 How., 278; 2 Sch. and Lef., 209, 210; 2 Bro. P. C., 39; 44 Barb., 167.

That there was no jurisdiction in the court of the United States, or that there was no personal service in the proceeding against the property when sold under the decree of confiscation (which are the allegations in the bill), are not supervening or extraneous equities which will enable a complainant in possession to settle in a State court of equity an admitted question of title between himself and the purchaser at the confiscation sale. Besides, should it be conceded that a State court of equity could under these circumstances settle the question of title, it certainly acts too hastily and without due consideration when, in the absence of a transcript of the record of the decree or judgment of the court of the United States, it proceeds to adjudge it, as well as the proceedings under it, void. Such matter, in the language of the statute, is not "proper to be decreed" without at least a transcript of the record, and courts of the State, as well as the courts of the United States, should be well satisfied that they do not exceed their powers, and that they act upon sufficient evidence, when they deal with the judgments and decrees of each other.

parties but the plaintiff and defendant

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concerned in the question, and there is no pretence for avoiding a multiplicity of suits within the meaning of the authorities upon that subject. 19 How., 279; 2 Sch. and Lef., 210.

The bill should have been dismissed at the hearing.

It is ordered, adjudged, and decreed that the decree in this cause is reversed and set aside, and that the cause be remanded to the court below with directions to take such further proceedings therein as are conformable to the views expressed herein and the principles of equity.

RANDALL, C. J.

Concurring with the opinion of the court in the disposition of this case, I desire to add the following suggestions, which are deemed pertinent to the character of the case and the nature of the proceedings had before the Chancellor.

The record in this case is in a very confused and almost unintelligible condition. The rulings and orders of the Chancellor in relation to the answer which the defendant attempted to put in, are vague, and indeed, the indorsement which appears on the back of the answer itself, is the only order in the record preceding the final decree in respect to it, although the decree *pro confesso*, signed by the complainant's solicitors, recites that the defendant is "still in default to answer," having failed to answer "in compliance of law and the order of this honorable court." I am therefore unable to discover that the court, prior to the final hearing and decree, did actually strike out the answer to which the defendant had annexed his affidavit, on the 7th day of December, 1867, or that it was adjudged by the court to be insufficient, or not in compliance with the supposed order requiring the said answer to be sworn to. The record should show that the answer was struck off by the court. I know of no rule giving the solicitors the power to adjudicate upon the sufficiency of an adversary's pleading. But in view of the final determination of the case, it is unnecessary to take any order relating to these proceedings.

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The bill alleges that the defendant “claims to have an interest in the premises by reason of a purchase under a certain confiscation sale, had by and under a decree rendered in the United States District Court,” and also by reason of a certain tax sale, had on the 13th February, 1865, by the U. S. Direct Tax Commissioners, under a certain act of Congress, for the collection of direct taxes in the insurrectionary States, and alleges that said confiscation sale, and the tax sale, were irregular, not made in conformity to law, are void and fraudulent, and the acts of Congress aforesaid were unconstitutional, inoperative, and void. As to the said direct tax sale, the bill does not show that the defendant claims to hold any tax certificate or tax deed of said premises, but alleges that such tax sale, and another tax sale of said premises, made in June, 1863, had been “set aside by the Board of Tax Commissioners, under and by direction of the Government of the United States,” By the complainant’s own showing, then, the defendant’s “claim” under the tax sale is not a color or cloud of title, but a mere empty pretext, which would not be regarded by any court, and cannot be made a source of serious annoyance to the complainant, or against which he is entitled to invoke the aid of a court of equity to obtain relief, as his remedy at law is unquestionable, plain, and adequate; indeed, the prayer that said tax sale be set aside, would seem to be superfluous, the government of the United States and the Tax Commissioners having already set it aside and annulled it, according to the averment in the bill of complaint.

The bill prays that the said confiscation sale may be declared void, and that the defendant’s title thereunder be set aside and declared void, and that the defendant be enjoined from asserting any interest in said premises thereunder, &c. The complainant (appellee) insists that “the principle is well established, that the jurisdiction of any court exercising authority over a subject, may be inquired into in every other court, when the proceedings of the former are relied on and *brought before the latter by*

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the party claiming the benefit of such proceedings." This is unquestionably true. Whenever a party introduces the proceedings or judgment of one court before another court, it can have no weight or force, if the court whose proceedings are so sought to be used, had no jurisdiction; and its record may be examined to ascertain its authority and jurisdiction; yet this right to question the jurisdiction is not in the nature of appellate or supervisory power, but a *rule of evidence*.

In this case the complainant, by his bill seeks to examine, review, and set aside the judgment and decree of the District Court of the United States, and to cancel and destroy the effect and power of such decree; in other words, the circuit court of this State is invoked to assume the character of an appellate tribunal, to decide whether the proceedings of the U. S. District Court are regular and according to law, and to reverse or annul such judgment or decree of the federal court. This is not the first time that such an experiment has been attempted. The lessons of history, too fresh in the memory of all, should have dispelled the notion of the supremacy of the States and State courts over the proceedings of the judicial tribunals of the United States, acting under and in the enforcement of the laws of the United States. The government of the Union has provided high tribunals, and invested them with full power and authority to examine and correct all errors committed by its inferior courts, and to keep them within their appropriate limits. The decisions of the appellate judicial tribunal of the federal government, upon questions arising under acts of Congress, are final, conclusive, and binding upon the judicial and political agents alike of the general and State governments; and in the event that the inferior courts of the United States transcend their authority and jurisdiction, the appellate power of the Supreme Court affords a plain, adequate remedy.

But it may be said that the writ of injunction sought, is in no sense a prohibition *to the court* in the exercise of its jurisdiction; that it is not addressed to the court, and does not affect to in-

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that the process is directed only to the party; it assume superiority over the federal court in proceedings were had, or attempt to control its proper execution is the "fructus, finis, et effectus legis." on stayed or prohibited, destroys the effect of the itself, and renders it of no value. Cases may occur, here, by reason of the transactions of parties to a rendered in the U. S. Court, the party may be enjoined a State court from enjoying the fruits of the judgment but this is not such a case.

oncan vs. Darst et al., 1 How., 301-8, the court say: general rule is. (5 Watts R., 144, and nothing is better that an officer is not justified in obeying the order of a court, having no jurisdiction in the matter; and this applies in an especial manner, as between the State and al courts, where it never has been supposed that the judges one could control the process of the other. If it was otherwise, and writs of injunction, of supersedeas, and orders discharge defendants from imprisonment, could be granted State courts, or judges, to render ineffectual process issued in the courts of the United States, the jurisdiction of the latter might be, and probably would be, overthrown in parts of the Union; as it would be the exercise of the power of prohibition, and might be extended to defeat the fruits of all judgments rendered by federal courts and judges. A conflict of jurisdiction fraught with more dangerous consequences could not well be supposed." In the same case the court remarks: "As State courts or magistrates cannot be compelled to aid a federal court in the exercise of its jurisdiction, so neither can they be permitted to restrain its process by injunction or otherwise, as was held in McKim vs. Voorhes." 7 Cranch, 279. The same was held in English et al. vs. Miller et al., 2 Rich. Eq. R., 320. The State filed a bill praying an injunction to restrain the

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collection of an execution issued upon a judgment recovered in the U. S. Circuit Court for South Carolina. The Chancellor says: "If the complainants had any peculiar equitable ground of relief against the judgment, their application should have been made on the equity side of the court which rendered the judgment. This court has certainly no authority to enjoin the proceedings of the federal court." On appeal to the Court of Appeals in equity, the decree of the circuit court was affirmed.

In the cases of *Ableman vs. Booth*, and *United States vs. Booth*, 21 Howard, 506, in which a District Court of the United States, having convicted and sentenced the defendant, Booth, to imprisonment under a statute of the United States, the Supreme Court of a State discharged the defendant from imprisonment under the writ of *habeas corpus*, on the ground that, in the opinion of the State court, the act of Congress under which he was convicted was unconstitutional and void, the Supreme Court of the United States say: "The supremacy of State courts over the courts of the United States, in cases arising under the Constitution and laws of the United States, is now for the first time asserted and acted upon in the Supreme Court of a State. The supremacy is not, indeed, set forth distinctly and broadly, in so many words, in the printed opinions of the judges. It is intermixed with elaborate discussions of different provisions of the fugitive slave law, and of the privileges of the writ of *habeas corpus*. But the paramount power of the State court lies at the foundation of these decisions; for their commentaries upon the provisions of that law, and upon the privileges and power of the writ of *habeas corpus*, were out of place, and their judicial action upon them without authority of law, unless they had the power to revise and control the proceedings in the criminal case of which they were speaking; and their judgment, releasing the prisoner, can rest upon no other foundation." "If the judicial power exercised in this instance has been reserved to the States, no offense against the laws of the United States can be punished by their own courts, without the permission and

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according to the judgment of the courts of the State in which the party happens to be imprisoned ; for, if the Supreme Court of the State possessed the power it has exercised in relation to offenses against the act of Congress in question, it necessarily follows that they must have the same judicial authority in relation to any other law of the United States ; and consequently, their supervising and controlling power would embrace the whole criminal code of the United States, and extend to offenses against the revenue laws or any other law intended to guard the different departments of the general government from fraud or violence. And, moreover, if the power is possessed by the Supreme Court of one State, it must equally belong to every other State in the Union, when the prisoner is within its territorial limits ; and it is very certain that the State Courts would not always agree in opinion ; and it would often happen, that an act which was admitted to be an offense, and justly punished in one State, would be regarded as innocent, and indeed praiseworthy, in another.

“No State can authorize one of its judges or courts to exercise judicial power within the jurisdiction of another and independent government. The powers of the general government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres ; and the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or court as if the line of division was traced by landmarks and monuments visible to the eye.

“The Constitution contemplated that in the sphere of action assigned to the Federal Government, it should be supreme, and strong enough to execute its own laws by its own tribunals without interruption from a State or from State authorities. And it was evident that anything short of this would be inadequate to the main objects for which the Government was established.

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"The judicial power (of the United States) was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but to guard the States from any encroachment upon their reserved rights by the Federal Government. And as the Constitution is the fundamental and supreme law, if it appears that an act of Congress is not pursuant to and within the limits of the power assigned to that Government, it is the duty of the courts of the United States to declare it unconstitutional and void."

The court says further: "If the authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States in any respect, it would be his duty to resist it and call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing more than lawless violence."

Now, in the case at bar, the court of the State is invoked to issue its injunction to prevent a citizen from obtaining benefits that have been accorded to him under the operation of a judgment of a court of the United States; and the State court has proceeded to adjudge unlawful and void an apparent right acquired in pursuance of such judgment on the ground that the Federal court had exceeded its judicial power, and has issued its injunction "forbidding and restraining the defendant from ever setting up any title or claim by reason of said confiscation sale."

The judgment and decree of the circuit court, therefore, is nothing more nor less than an attempted exercise of a quasi appellate jurisdiction, bringing in review and annulling the judicial proceedings of a tribunal having exclusive jurisdiction of the subject matter, and threatening a party with the pains and penalties of disobedience and contempt, if he shall at-

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tempt to enjoy the fruits of the judgment of the Federal court. I conceive that the circuit court had no power to award the "relief" prayed for, and that its proceedings tend to bring on a conflict between the State and Federal authorities, if either should proceed to enforce its decree.

It is further alleged by the complainant in his bill that the defendant was in possession of the premises in question prior to the third of November, 1865, under his said pretended title. Instead, however, of commencing his action at law to recover such possession, and establishing his own superior title, (in which action the defendant, by setting up and claiming his rights growing out of the confiscation sale and the tax sales, would have subjected his evidences of title to inquiry and adjudication, upon the principle that "the jurisdiction of any court exercising authority over a subject may be inquired into in every other court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings.") he entered into an agreement with the defendant whereby he obtained possession of the premises subject to the legal rights of the parties, to be determined by the courts, and the respective parties agreed to await and abide by the adjudication of the courts in cases already commenced or about to be commenced, and engaged that in the event that the final decision of the courts should be in favor of the tax purchasers, the complainant was to pay the defendant a reasonable rent, to be determined after such final decisions by and between the parties; and that this complainant has ever since occupied said premises, awaiting the final decision of said States Circuit Court; and says that the defendant, disregarding said agreement in July, 1867, demanded payment of hundred dollars of rent or the possession of the premises, threatened to invoke the aid of the proper authorities if the complainant should refuse to comply with the demand; that the defendant had commenced a proceeding again

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before a justice of the peace for the purpose of removing complainant from said premises, all which actings and doings are alleged to be "contrary to the express understanding, and in violation of said agreement, and contrary to equity and good conscience."

I have no doubt that under this state of facts the proceedings before the justice of the peace would have been dismissed whenever such facts should appear. This agreement estops the defendant from taking any such measures to obtain possession. His right of possession, as well as his claim for rent, depends upon the adjudication of questions affecting the title and interests of the respective parties in the premises, according to the terms of the agreement as set forth in the bill.

It is claimed that the complainant, by reason of the violation of the agreement in instituting such proceedings before the justice of the peace on the part of the defendant, had a right to abandon and treat the contract as rescinded, and having the advantage of possession under the agreement, to file this bill to secure himself from the annoyance of the suit before the justice, and to cancel all the defendant's pretended evidences of title; and he may say that he is not in a condition to bring an action of ejectment because he is already in full possession. But if he chooses to abandon the agreement, and resort to measures not contemplated by it, because the defendant has not kept it, he must not take any such advantages of the agreement himself as is given by his being in possession under it. If he abandons and rescinds it in one respect he must abandon it altogether; and having placed the premises in the condition in which he found them, to wit: in the possession of the defendant, he then has this plain, adequate, and complete remedy at law, and may accomplish thereby and enjoy the full benefit of all his legal rights as fully and completely as he undertakes to do by this bill.

When he shall have restored the defendant to the position in which he found him, and by his appropriate action recovered

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possession of the premises, his own rights and the rights of defendant will have been duly passed upon by a court and y, and he will be under no necessity of invoking the aid of a rt of equity; but if he desires to reverse and set aside the dgment of the court of the United States, he must proceed efore those tribunals which have the jurisdiction and power to ve him the remedy sought.

In my opinion the bill should be dismissed.

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MARIE E. MYRICK, APPELLEE.

1. Under the statutes regulating appeals in chancery from final or interlocutory decrees a bond is not necessary to perfect an appeal. The only result attending a failure to give bond under the statutes is, that the appeal does not operate as a supersedeas.

2. Where an appeal is prosecuted from an interlocutory order or decree in chancery, under the act of 1853, if the bond is in a sufficient amount and so conditioned as to secure the appellee fully in his rights, as well as for all damages in the event the decree of the court below is affirmed, either in whole or in part, it is a sufficient bond.

Appeal from the Circuit Court of Jackson county.

This was a motion to dismiss the appeal for the want of a bond.

C. C. Yonge, for the motion.

J. F. McClellan, with whom were Papy and Peeler, against the motion.

WESTCOTT, J., delivered the opinion of the court:

This is a motion to dismiss the appeal in this cause, upon the ground that sufficient bond is given as required by law. The statutes regulating appeals are discussed at bar as to the sufficiency of the bond.

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chancery. These questions can only be the proper subject-matter of consideration in the event that a bond is required to perfect an appeal in chancery causes. If no bond is required under the statutes, then the inquiry as to the sufficiency of the bond here becomes unnecessary for the purpose of determining this motion.

The statute regulating appeals in chancery from final decrees, the statute of February 11, 1832, provides that appeals may be taken from final decrees at any time within two years.

As remarked by Justice Thompson in 5th Fla., 252, these appeals from the equity side of the court operate as a supersedeas in two cases.

First. "When the appeal is entered, as in other cases, as provided by the general law of February 10, 1832, Thomp. Dig., 446, which is during the term of the court in which the decree is pronounced, or within ten days after adjournment; and secondly, when being taken within two years after it is pronounced, a justice of this court shall allow its operation as such upon giving bond and security as required by law. Thomp. Dig., 462. The first-named supersedeas is obtainable as a matter of right, subject to no condition except that of giving the security required by law, and the other rests in the exercise of the sound discretion of the judge."

What effect the act of 1853 may have upon this subject, in providing that causes may be heard and determined in vacation as well as term time, it is unnecessary to consider here.

The act of January 7, 1853, authorizes appeals to be taken and prosecuted from any interlocutory order, decision, judgment, or decree of the circuit court of this State when sitting as a court of equity; but appeals in these cases do not operate as a supersedeas unless the judge of the circuit court or a Justice of the Supreme Court, on inspection of the record, shall think fit to order and direct a stay of proceedings, and no appeal thus allowed can operate as a supersedeas, except on the conditions prescribed by law.

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The conditions prescribed by law in cases of appeals from final decrees, which must be complied with before the appeal from the interlocutory order, decision, or decree can operate as a supersedeas, are to be found in the act of February 10, 1832, construed in connection with the other acts upon the subject.

Where an appeal is taken from an interlocutory order or decree, the bond is sufficient to justify an order of supersedeas if it, in case of a failure to reverse the order or decree either in whole or in part, is so conditioned as to bind the sureties for its performance, or for damages in case of non-performance, in so far as it is affirmed by the appellate tribunal.

The purpose of the bond is to secure the appellee in the benefits of the decree or order, in the event that the appellate tribunal refuses to sustain the appeal in whole or in part, and we think a supersedeas should be awarded when such is the case, and the justice thinks, in his discretion, that it is a case justifying a supersedeas. The act of 1853, when a supersedeas is desired, should be construed with reference to its object and purpose, its spirit and intent, which is to secure the appellee fully in his rights, as well as for all damages, in the event the decree of the court below is affirmed either in whole or in part, and if the condition of the bond is such as to secure this end, it is in our judgment a substantial compliance with its requirements.

So far as the matter of costs is concerned there is no difference, and the bond must come up strictly to the requirements of the old law.

The statutes regulating appeals from the equity side of the court, Thomp. Dig., 462, and chap. 521, Laws of Fla., authorize first an appeal in general terms, whether the decree be final or interlocutory, and then under a proviso prescribe conditions under which the appeal so authorized by law shall operate as a supersedeas.

Recollecting the office of a proviso, which is simply to qualify and restrain some preceding general grant of powers or authority of the opinion that the only result of a fa

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give bond in appeals in chancery, is that the appeal does not operate as a supersedeas, and that it is not good ground to dismiss the appeal. The law requires a bond, for the appeal to operate as a supersedeas. There is no general requirement of a bond to authorize an appeal in chancery.

In this view it is unnecessary to determine whether the bond in this case comes up to the requirements of the law, before a supersedeas can be awarded. If a supersedeas has been improvidently granted, this motion is not the remedy.

Motion overruled.

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MARIE E. MYRICK, APPELLEE.**

1. The husband having executed a deed conveying the whole of his estate, the conveyance will not be set aside, upon a bill by the wife charging that the husband was of unsound mind, and incapacitated to contract at the date of its execution.

2. Where such a bill is brought by the wife against the grantee of the husband, there being no equity in the bill, or *prima facie* case made against the defendant, an interlocutory order, directing such grantee to pay an allowance to the wife *pendente lite*, is improper.

Appeal from the Circuit Court of Jackson county.

The opinion of the court states the case.

J. F. McClellan and Papy & Peeler, for Appellants.

We insist, under the first error assigned, that John D. Myrick should have been made, and is, a necessary party to this bill. He is interested in the estate to be affected by the decrees, and under the deeds there is a resulting trust to him, if anything is left after the object of the trust has been accomplished; and this rule will apply with equal force to the creditors enumerated

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in the exhibits. Story's Equity Pleadings, 72, 78, 135, 139, 81, 70; 1 Danl. Ch. Ple. and Pr., 202; 4 Wash., C. C. Rep., 202; 1 Hill, N. Y., 97. W. D. Barnes, the agent of John R. Kilbee, should not have been made a party. Story's Eq. Ple. §231.

The complainant cannot sue alone, for the bill discloses the fact she is a married woman, and should sue by next friend. Complainant falls within none of the exceptions to this rule. Story's Equity Pl., 61; Daniel's Ch. Prac., 84, 105, 106.

The second error assigned embraces a very wide field of discussion. We claim the complainant fails to disclose, by her bill, the fact that she has any interest in the property she seeks to charge. It is clear the courts of this State have no jurisdiction over the person of John R. Kilbee, or the property in Virginia embraced in one of the exhibits to the bill. 4 Md. Ch. Rep., 60. The deed of an idiot or lunatic is not absolutely void, but voidable; but we insist the complainant in this cause cannot avoid the deeds of 27th of October, 1866, because there is no privity of estate or of blood between her and John D. Myrick. This question will be fully discussed by my associate counsel.

It does not appear from this bill that John D. Myrick, who made the deed, was a lunatic at the time or before, or that the inquisition alleged to have been taken, covered and embraced the date of the making of the deeds. If it had, the deeds are not of necessity void, if fair, and with notice; especially where the parties cannot be reinstated. Neil vs. Morely, 9 Vesey, 478 and note. Notice is not alleged, and indeed the complainant admits that she sought to impress upon the friends of John D. Myrick the fact that he was quite sane. John R. Kilbee was his friend. The parties cannot be placed *in statu quo*. The estates in Virginia have been sold and the money applied.

It is not charged in the bill that there was any fraud used by John R. Kilbee to procure the executions of the deeds, or that the objects of the deeds were not necessary and beneficial to Myrick. It is not charged that they were beneficial to John

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R. Kilbee, or that the debts they were made to pay off did not exist. Courts of equity interfere upon the ground of fraud. There was nothing, and there is no charge in the bill, that Kilbee acted in the matter *mala fides*. 9 Vesey, §482; 7 Story's Equ., 226, 227; 2 Paige's Ch. Rep'ts, 153; 5 *ibid.*, 242.

As to the three errors assigned, the courts should not have made the order in the first place, and therefore should have set it aside. Before the court acted, the question should have been tried as to whether Myrick was a lunatic when the deeds were made. 9 Vesey, 605. No order should have been made affecting the estate in the hands of the trustee, Kilbee, until there was an answer put in by the defendants, and because Myrick was insolvent. 5 Wheaton, 424; 17 Howard's S. C. Rep., 130; 4 Md. C. Rep'ts, 126.

The exceptions to the Master's Report were properly taken. There was no evidence before the master to sustain his report.

The evidence before the master showed that John D. Myrick was insolvent, and that the property in the hands of Kilbee would not pay his debts. See Barnes and Odum's affidavits. The evidence showed the complainant was not without means. See Barnes and Odum's affidavits. There was no other evidence before the master, none is filed, and none is taken. None, whatever, is referred to.

As to the last error assigned, the bill does not show the complainant had any interest in the property embraced in the deeds, either in law or equity; therefore she could not apply to have them set aside or annulled. And besides, the parties are not before the courts who could ask them annulled or set aside, and therefore no order should have been made in complainant's behalf. Fonblanque's Equ., 50 and 57; 4 Danna, 349; 1 J. J. Marshal, 245, 248, 2 Blk's Comm., 290; 8 Paige's Ch. Rep., 609; *ibid.*, 325; *ibid.*, 445.

By these authorities only privies in blood and representatives can avoid the deed of a lunatic. The same is true of infants.

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2 Kent's Com., 261 and 262; 6 Johnson's Rep., 257. Privies in estate cannot. 2 Dev. & Batt, 323.

Hawkins Bush and *C. C. Yonge*, for Appellee.

Geo. S. Hawkins, in behalf of Appellee.

Mrs. Marie Myrick, in this case, makes an application for an allowance, by way of maintenance, out of the estate of said John D. Myrick, a lunatic, said estate being in the hands of W. D. Barnes, his guardian or committee. A decree was made by the court allowing the sum of sixty dollars per month for the yearly support of Mrs. Myrick, and the sum of five hundred dollars for court expenses in obtaining the decree.

The whole or entire decree is resisted, and appeal taken. We contend that the decree was proper in all its provisions.

In several, if not most of the States of the Union, there are provisions by statute for the care and custody of lunatics, and their maintenance. That of Florida is to be found on page 26 of the laws of 1856. It confers upon the court the power to bind the estate by its decrees. This grant of power was superfluous, the court of chancery possessing it by virtue of its inherent jurisdiction, and indeed having the most plenary authority over the person as well as the estate of the lunatic. 2 Story's Eq. Ju., § 1335, 1837, 1362, 1365; 2 Maddox Ch. P. 723, et seq., *In re Wendell*, 1 John. Ch. R., 600; *Latham vs. Wendell*, 2 Ireland Ch. R., 298. It is very trite to remark, that every man, if he has the ability, is obliged to support his wife and children. Of course this moral duty, or at least its practical exercise, is, as to a lunatic, incapable of being performed; but a court of equity acts for him, and performs those duties which the husband was bound to execute had he been sane.

The court looks solely to the advantage and benefit of the lunatic, disregarding of the rights of those in succession, and even creditors. *In re Salisbury*, 3 John. Ch., 347; 1 Rus. & M., 371. "This principle of looking to the lunatic's advantage alone is pursued in fixing the amount of maintenance, (says Mr.

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Adams,) and provisions may be made for the lunatic's benefit, though they may not be such as he is legally bound to incur; *e. g.*, if the father of a family be lunatic, the court will not consider the mere legal right of his wife and children, but will make allowance suitable to their station in life." Adams' Eq., 297. A court of chancery will listen to the voice and instincts of our nature, and order the committee to perform all such acts (as before remarked) which the lunatic would and was bound to do if he were sane. *Ex Parte* Whitbread, 2 Merr., 99. In New York, the court has power to decree maintenance, even for adopted children. See matter of Heeney, 2 Barbour Ch. R., 326. In England, allowance was made out of lunatic's estate for a daughter about to be married. *In re* Drummond, 1 Myl. & C., 627. So for brothers and sisters. *Ex parte* Whitbread, 2 Merr., 99. And for illegitimate children. *Ex parte* Haycock, 5 Russell, 154. So for nephews. *In re* Blair, 1 Mylne & Craig, 300 *vide* also Shelford on Lunatics, 160.

In Ireland it was held that the———court, on proper case made, will grant increased maintenance to lunatic, in order that the same may be applied to the support of near relatives of the lunatic. *In re* Creagh, 1 Dr. & W., 323. In Pennsylvania, decrees are made for support of the family of lunatic. *In re* Eckstein, Parson's Selected Cases, 69.

It will no doubt be argued that the debts against the estate of Myrick should be paid and have the preference; but Mr. Adams, remarks, "*there is no instance of paying debts without reserving a sufficient maintenance,*" &c. It will be seen on pages 297, 627, that though the allowance is nominally made for maintenance of lunatics, it *includes* for the family also, which is decreed under the name of maintenance for the lunatic himself, Adams' Eq., 297, 627. In other words, the allowance to lunatic will be increased so as to *include* that of his family. Court will decree maintenance, though there are debts. *Ex parte* Dikes, 8 Vesey, 79; Hastings *ex parte*, 14 Vesey, 182. It is unnecessary to multiply authorities on this point.

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The allowance for counsel fees and court expenses was proper. The application of Mrs. Myrick for this purpose, and her bill of complaint, are substantially proceedings *in rem*, and the court in its action takes hold of the estate of Myrick, holds it subject to its decrees, and it becomes thereby *in custodia legis*. She states she has no property of her own, and the estate of Myrick is the appropriate fund which should bear the burthen of her application. In courts of equity the prevailing party is entitled to costs, and these are always matters of discretion for the court. 1 John. Ch. R., 166; Eastburn vs. Kirk, 2 John. Ch. R., 317; 3 Daniel Ch., 1516. Appellate tribunals seldom revise the exercise of discretion of the court below as to costs. 4 Fla. R., 441. In cases of divorce, a reasonable counsel fee is allowed against the husband, when the wife applies for a divorce. Graves vs. Graves, 2 Paige, 62. In the matter of Lyth, 3 Paige Ch'y Rep., 251, it was held, on petition of wife of a lunatic, *having no property independent of that of her husband*, for the removal of the committee, she will be entitled to costs out of the estate, though the petition is denied, if she had reasonable cause for the application.

The theory upon the subject of lunacy (with proper deference) may thus be summarily stated: Upon the finding of an inquisition in lunacy, (and there was an inquest here,) the person and property or estate of the declared lunatic become subject to the order and jurisdiction of a court of chancery, the chancellor, with us as in England, representing the State or sovereignty; for, as Judge Gaston says: "In every civilized community, the State is bound to take care of those, who, by reason of their imbecility and want of understanding, are unable to take care of themselves." Saying nothing of the British Statutes conferring this power upon courts of chancery, (indirectly, to be sure—first upon the King, and by him delegated to the chancellor,) the statutes of 1856, p. 26, clearly clothes our courts of chancery with plenary power, when in section 2 of said act, it declares that if the person is declared a lunatic, or insane, "the judge

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shall make such order or decree as is *usual or necessary* in such cases." The decree or order for the maintenance of the family of Myrick is, we have seen, a usual and common one by the English and American decisions. The order is interlocutory and temporary, and unless for the most cogent reasons, will not be disturbed. It is for *ad interim* support of Mrs. Myrick until the coming in of a final decree. As before remarked, it being a proceeding virtually *in rem*, many of the rules of pleading as to parties, &c., in ordinary cases, do not apply. 2 Iredell Ch., 297. The estate and all its incidents, as to their disposition, are within the jurisdiction and discretion of a court of equity. In the case of Latham vs. Wiswall, 2 Iredell Ch., 297, already cited, upon an order of sale the lunatic's estate, a creditor intervened and objected to the decree on the ground that he *was not a party to it*, but the court said the objection could not avail; and Judge Gaston places his opinion upon the ground that it was analogous to a proceeding *in rem*.

C. C. Yonge, for Appellee, and in reply to brief of Appellant.

Complainant filed a bill against Kilbee and Barnes, charging that she was married in January, 1866, to John D. Myrick, and that he soon became insane and was committed to asylum, and on his discharge that Kilbee presented him with two deeds of trust for execution, conveying the whole of his estate.

That soon after, Wm. D. Barnes, the agent of Kilbee, had inquisition of lunacy made and Myrick was sent back to asylum.

That complainant is in needy circumstances, and without the means of support, or means to prosecute a suit for maintenance.

It is objected,

First. That there is defect of parties.

1. That Barnes as agent is an improper party.

2. That the creditors of J. D. Myrick should be parties.

Second. That complainant is not privy in blood or in representation, and cannot ask the relief prayed.

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ly, That doctrine cited against making an agent a party subject to the exception of cases where fraud is charged or by the allegations and proofs. 1 Dan., 345.

That in proceedings for maintenance of lunatic which includes his family, the court will not regard the claims of creditors, and they need not be parties. *In re Salisbury*, 3 John. h., 347; *Adams' Equity*, 297; 2 *Merivale*; 2 *Barbour*, 326. Will order increased allowance for lunatic, that it may be used for support of near relations. 1 D. and W., 323.

No case of payment of debts without reserving a sufficient maintenance, and in 2 *Iredell Ch.*, 297, objection to decree on ground that creditor not a party, overruled.

3. That this is a proceeding *quasi in rem* against the estate of the lunatic husband, which is within the jurisdiction of the court, and the strict rules of pleading with regard to parties do not apply. See *Iredell Ch.*, 297, which was ruled on this ground.

4. That this is not an appeal from a final decree, and therefore does not involve the merits of the case either as to the law or to the facts, but is from an order giving temporary allowance, an allowance *ad interim*, and if there is defect of parties, these defects could have been remedied by amendment under the rules in chancery practice.

5. That complainant, or wife of John D. Myrick, has a standing in equity, entitling her to ask relief out of the fund or property that is within the jurisdiction of the court.

1st. Because of the marital obligations of the husband to support and maintain the wife, and the resulting equity to claim this support out of such property of the husband as is within the jurisdiction of the court.

That under the influence of this equity, the court will permit a fraudulent deed executed by an insane husband stand in the way of the rights of the wife.

That on filing bill of divorce and alimony, court will

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temporary support to wife. *Mix vs. Mix*, 1 John Ch., 108; *Ward vs. Ward*, 2 Paige, 247.

2. That fraud vitiates and destroys every transaction as between parties who have the right to complain of it.

That the wife has the right to complain, as her maintenance and support depend upon the protection and preservation of the property claimed to have been conveyed.

3. That as wife of the lunatic she has a right, future and contingent, it is true, to a share of the personal estate of the husband to become vested at his death under the dower laws of the State; and as to the realty, an existing and present right, as no conveyance can be made by him of her right of dower without her relinquishment and renunciation. *Show.*, 184.

4th. That all that was required to authorize the temporary allowance made by the Chancellor was a *prima facie* case, and this was made by showing that the relation of wife existed, that she was in destitute circumstances, and that the husband was lunatic at the time of the execution of the joint deeds, reserving for future consideration the full proofs to be taken by depositions or otherwise.

Acts done before a commission of lunacy, but overreached by the retrospective finding of the jury, the inquisition is presumptive evidence of incapacity. 2 Paige, 427.

That where lunacy is once established it is presumed to continue, and if an act of the lunatic is sought to be upheld it must be proved to have been done in a lucid interval. *Story's Eq. Juris.*, § —; *Shelford on Lunacy*.

That objections for defect of parties should have been made by demurrer or other proper pleading in court below. See 1 *Dan.*, 350, and Note 2.

That the only matter proper for the review of this court is whether there was sufficient evidence before the chancellor to warrant the two orders made by him. I insist that the allegations in the bill were sufficient to warrant the reference to the

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master to report what would be a proper temporary allowance, and that the report of the master constituted a sufficient basis for the temporary allowance under the interlocutory order, and that it was not required that the master should have reported the evidence on which his allowance rested.

WESTCOTT, J., delivered the opinion of the court:

This bill is brought by Marie E. Myrick, the wife of John D. Myrick, a lunatic, against John R. Kilbee and W. D. Barnes, his agent. It alleges that her husband, being of unsound mind and incapable of contracting at the time, executed on the 27th of October, A. D. 1866, deeds of conveyance covering his entire estate to John R. Kilbee, upon certain trusts therein specified; that W. D. Barnes is the agent of the trustee now in possession of the property conveyed by the deed, which is located in Florida, in Jackson county, in part, while a portion of the property embraced in the deed is situated in the State of Virginia. The bill alleges further, that she was induced to relinquish her dower interest in the property by misrepresentation of the trustee, Kilbee. The prayer of the bill is that the deeds may be declared void and inoperative, that an account may be taken of the rents and profits of the property in the hands of the trustee, that a receiver may be appointed to take possession of the property, that a guardian of the person and estate of the lunatic may be appointed, and that a proper allowance may be made for the support and maintenance of John D. Myrick, and of the complainant, stating that she is in destitute circumstances. It is necessary to state that the record discloses that a commission of lunacy had been issued, and the husband had been adjudged a lunatic subsequent to the execution of the deeds and before bill filed. Upon filing the bill the chancellor passed an order directing the master to "make a report as to what amount will be proper and suitable as a temporary allowance for the support and maintenance of the wife, and the nec-

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sary costs of suit, counsel fees, &c., until the cause shall be brought to a hearing."

The defendants move to vacate this order shortly after it is made, and the motion is denied. Subsequently the master reports sixty dollars per month as a proper allowance for the wife, and five hundred dollars as a proper amount for costs of litigation. This report is excepted to on various grounds by defendants, which it is unnecessary to mention. After argument the chancellor overruled the exceptions, confirmed the report, and passed an order directing the defendants to pay to the master for the use of complainant "the sum of sixty dollars per month for maintenance and the sum of five hundred dollars for costs of litigation and counsel fees."

An appeal is now prosecuted here by the defendants, and they pray a reversal of the decrees and orders made by the chancellor upon several grounds.

As the bill alleges that the whole estate of the lunatic was embraced in these deeds, and consequently there is nothing now in the hands of any committee or guardian of the lunatic, if, indeed, there ever was any committee, which is not disclosed by the bill, we deem it unnecessary to pass upon any of the grounds upon which the reversal is prayed except that which raises the question as to allowance, and whether the wife of a lunatic can set aside a conveyance of her husband made before a commission of lunacy, on the ground of his incapacity to contract arising from unsoundness of mind, by bill filed against the trustee named in the deed of the husband and his agent in possession of the property.

A person being found a lunatic upon commission and inquiry, a committee or guardian should be appointed to take possession of his estate and manage it under the direction of the chancellor, who has plenary powers in matters of this character. In this case the bill does not disclose that there ever was appointed a guardian or committee.

If the lunatic has, anterior to these proceedings, but while of

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unsound mind, entered into a contract which should be set aside on that ground, the lunatic by his guardian must under the statute of this State institute the proceeding.

The wife may be allowed a reasonable allowance from the estate, nor is her right limited to any mere legal demand, and a chancellor upon proper proceedings would allow it if there was any estate to allow it from. In divorce cases the chancellor will tax even the faculties of the husband, but the lunatic is without anything except estate.

If in a case such as this is represented to be by the bill, the guardian should decline to institute any proceeding to set aside the deeds of the lunatic, we can see, as present advised, no objection to the wife bringing the matter to the attention of the chancellor by petition praying that the guardian might be controlled to this end, and the chancellor would then exercise his discretion.

If a lunatic husband enters into a contract divesting himself of his entire estate, and leaving his wife and children without support and helpless, a court of chancery will not fail to be active when appealed to, and in a proper case will control the committee or guardian. There is no doubt a remedy, but that remedy is not by bill *brought by the wife* against the grantee of the husband in possession. Upon the lunacy of the husband she does not become his legal representative like an administrator in case of his death.

The lunacy of the husband does not increase the marital obligation of the husband to support the wife in such a way as to invest her with his rights and clothe her with power to institute suits to set aside his deeds, and we see no more authority for the wife bringing a bill to set aside the deed of the husband on the ground of his insanity at the date of its execution, than we do for the wife to file a bill to set aside the deed of the husband on any ground which would avoid it if set up by himself. For instance, fraud in the grantee, in numerous instances illustrated in the books.

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The common law doctrine was that no man of full age should be admitted to stultify himself, and it has been insisted that a court of equity could not give relief in the face of the common law rule, and set aside the deed of the lunatic upon his request or that of his committee; a distinction being taken between the lunatic himself and his heirs, executors or administrators after his death, the last being permitted, under certain circumstances to avoid his acts after his death upon the ground that he was *non compos mentis*. 1st Story, par. 225; but that a court of equity will now avoid his acts upon proper proceedings, and in a proper case, is settled notwithstanding the common law maxim. The ground upon which a court of equity interferes is fraud; every person being deemed guilty of meditated fraud when he deals with them with knowledge of their incapacity. Even this rule, however, has its exceptions, as all deeds of *persons of unsound* mind are not to be set aside necessarily. There can be no doubt, and the proposition is too plain to be questioned, that the wife could have no standing in a court of equity to set aside the deed of her sane husband for fraud, which would enable him to do it, and the same is the rule here. 8 Paige's Chy. Rpts., 612.

There are other objections urged to the proceedings in the court below, but we deem it unnecessary to refer to them.

There is no fraud here subject to the order of the court, there is no guardian or committee, and we do not see how the defendants can be directed to make payments when they allege that they are in advance to the estate, and the contrary is not made to appear, and besides, no *prima facie* case is here made to justify the allowance for counsel fees.

It is ordered, adjudged, and decreed that the decree of the chancellor making a temporary allowance to Marie E. Myrick, and allowing court expenses in this case, is set aside and reversed, and that the cause be remanded for such proceedings as are conformable to this opinion and the principles of equity.

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FERNANDO A. UNDERWOOD, APPELLANT, vs. ELLEN UNDERWOOD, APPELLEE.

1. Deficiencies in the record cannot be taken advantage of by motion to dismiss the appeal. If the appellee desires to remedy the deficiency, he must suggest the diminution and move for a *certiorari* under the rules.

2. What is good cause for an omission to file a copy of the record on the first day of the term of this court in accordance with the statute, is matter to be addressed to the discretion of the court. In this case, held that the state of the country at and preceding the first term of this court was sufficient cause to excuse a failure to file the record on the first day of that term.

Appeal from the Circuit Court for Alachua county.

This was a motion to dismiss the appeal upon grounds stated in the opinion of the court.

J. B. Dawkins, for Appellant.

C. P. Cooper, for Appellee.

HART, J., delivered the opinion of the court:

This case being upon the docket, the appellee made a motion to dismiss it on the ground of alleged deficiencies in the record. There is nothing in the statutes of the State, nor in the rules of court, authorizing this court to make an order for the dismissal of a cause on such grounds. If an appellee desires to have any material deficiency in the record supplied, he must suggest the diminution, and upon a proper showing, a *certiorari* will be awarded. If he permits the appeal to be heard without supplying the deficiency, it is his fault. This is no ground for a motion to dismiss. The court cannot open the record upon this motion except to see whether the appeal has been properly perfected and brought here. The motion is overruled. Whereupon the appellee makes a second motion to dismiss this cause, assigning

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For cause that there is no record, because what purports to be a **r**ecord was filed at the present term of the court, a term of the **c**ourt having been held since the appeal was taken; and filed the **c**ertificate of the clerk of the circuit court to the effect that an **a**ppel was obtained and a bond given by the defendant; that **t**he bond was filed on the 17th day of June, and the citation **s**erved on the 17th day of October, A. D. 1868. For this cause, **u**nless good cause is shown by the appellant, the appeal should **b**e dismissed. Such is the requirement of the statute. Strictly **s**peaking, this court should not permit or hear repeated motions **f**or the same order, but as counsel was permitted to argue it, it **s**hould be decided. The appeal was returnable to the term of **t**he Supreme Court then existing, next after it was obtained. **T**he new Constitution ratified in May and proclaimed in June, A. D. 1868, changed the time and place of holding this court to the seat of government in October, 1868.

The general uncertainty which existed throughout the State **i**ncident to the great changes then being made in the fundamental law of its government, continued by the difficulties attending the publication and distribution of official copies of the new Constitution, and of the statutes passed at the first session of the Legislature, are considered under the circumstances by the court as good cause shown why this motion should not be granted. It is the duty of the appellant to have his record here at the time **p**rescribed by law, and but for these public reasons this appeal **w**ould be dismissed. He has thirty days to perfect his record **i**n, and if he fails to do it, unless for very good reason, his **a**ppel will be dismissed.

The motion is denied.

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ERNANDO A. UNDERWOOD, APPELLANT, VS. ELLEN UNDERWOOD, APPELLEE.

1. Where, upon bill filed, a decree of divorce a vinculo matrimonii, and of reference to master to report as to allowance for alimony, is passed upon the consent and agreement of the parties, an appeal from the order confirming the report when made, and fixing the alimony, opens for consideration under the statute of this State the decree of divorce, and though the parties may not desire to disturb the decree of divorce, it will be reversed if improperly granted.
2. A decree of divorce from the bond of matrimony cannot be entered properly upon the mere consent or agreement of the parties of record. There must be a complaint of due form, for a cause authorized by law, supported by due proof.
3. *Ad interim* alimony, or alimony pendente lite, as well as the allowance of a sum to the wife to enable her to prosecute her suit, are given not as of strict right in the wife. It is a matter for the sound discretion of the court.
4. If no order awarding alimony pendente lite or counsel fees is made until after a decree for divorce, such an order under the statute should be then made unless the nature of the case makes it "fit, equitable, just."
5. Where the wife has brought her case to a hearing before such an order is made, no allowance, either for alimony or costs of counsel, should be made where the case from the evidence and the pleadings is one in which she had no reasonable ground of suit.

Appeal from decree of the Circuit Court of A
county.

Statement of the case appears in the opinion of 1

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HART, J., delivered the opinion of the court:

This is an appeal from a decree in chancery rendered in Alachua county by the judge of the circuit court for Suwannee Circuit, in a suit by Ellen Underwood against Fernando Underwood for divorce a *vinculo matrimonii*, and for alimony *pendente lite* and permanent, on the ground of extreme cruelty. The motions to dismiss this cause having been overruled, the court proceeded to consider it.

Upon the reading of the record it is found to consist of, the bill, præcipe, and subpoena; the answer, an agreement of the parties by their solicitors that the court shall make a decree divorcing the parties from the bonds of matrimony, and that the questions of alimony, both *pendente lite* and permanent, with costs of court and counsel's fees, be referred to a special master to take testimony, to be referred to the court at such time as the court may order; a decree of divorce, and reference to the master to take testimony and make his report in accordance with the above agreement; the testimony; the decree of alimony, cost and fees; the citation, the appeal bond, the certificate of the clerk; the petition of appeal; and the order of one of the justices of this court making the appeal a supersedeas.

The decree of alimony, costs and fees, was argued *pro* and *con* by the solicitors of the parties, both being content with the decree of divorce.

The statute authorizes decrees for alimony in cases of divorce for extreme cruelty. The question of alimony in such a case depends as much upon the truth of the charge of extreme cruelty as that of divorce does; if, therefore, in this case there is not sufficient cause for the one, it is not seen how there can be for the other.

The evidence purports to give the deportment of the parties to each other from the time of the marriage to the time of the separation, and upon the subject of extreme cruelty is substantially as follows:

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Edward R. Pooser, a witness for complainant and her brother-in-law, in whose family she resided at the time of the marriage, and to whom she returned when she left her husband, and who knows the defendant, testifies that he knew of no unkind treatment by defendant or his children. Complainant on the occasion of her return to his house, did not complain of any unkind treatment, but stated that she never received any unkind treatment from defendant, and would be willing to live with him in a bark cabin were it not for his children. She could not consent to stay there during defendant's absence, on account of his two daughters. That she had no idea of abandoning him at that time, and that he expected to be absent one night and perhaps two.

Mrs. Annie Pooser testified that she is acquainted with the parties, and intimately acquainted with defendant's children. The day before complainant left, heard defendant's daughter, Julia, about eighteen years of age, say that she would put complainant out of the house or be put out herself. Thinks complainant is dependent upon her own exertions for a support. Has known her since 1861. She is a lady of refined feelings and sentiments. Both she and defendant's family moved in the highest circles of society. The conversation with defendant's daughter occurred at the house of witness's father. Julia appeared to be vexed at the time. Knows of no unkindness or cruelty by defendant to complainant. Was at defendant's house several times after the marriage. Defendant always treated complainant with perfect kindness in witness's presence. Saw no unkindness by defendant's children to complainant, in presence of their father.

Complainant sworn, testified that while living with defendant as his wife, she was annoyed by information of others that she would be put out of the house by his daughters during his absence. There never was any unpleasantness besides the above stated facts. The children demeaned themselves towards her a part of the time as if they were her own. The threat that was brought to her put her in fear of rude violence; this was the moving cause; defendant was to be absent that night and re-

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turn next day; he was preparing to leave, when she told him that she wanted to leave and return to the house of her brother-in-law; it was very unpleasant for her to live there on account of the manner in which she was treated, and she preferred to have other arrangements made; he said he could not put his children out of the house; that if she left without his consent, she could not return with his consent; and she left without his consent on the fifth of July; was at home all day on the fourth; received the above-mentioned information on the fourth; that information was the only and sole cause of her leaving; he said he had promised Mr. Weed, and was going to hunt with him, on a pleasure trip, expecting to be back that night or next morning; she told him that if he left home to go to Mr. Weed's, she would leave too; he begged her not to leave, that she had better think more about the matter, and not act too hastily; she replied that she intended to go, if she had to walk; that she would rather live with Annie and her children than live in the manner in which she had been living. Their interview was about fifteen minutes long, and all the while he used his efforts to get her to remain. He said: "Ellen, if you will go, don't walk, but take my horse and buggy." He asked her what was the matter and what he could do to reconcile her; she did not then tell him the information that had been conveyed to her the day before, but said she was afraid to remain at home on account of a difficulty that had arisen between the children and herself; that she was very much displeased with the conduct of one of the children towards her the past two or three days. There was no unkindness on his part nor any of the children except Julia. She did not apprehend any violence from Julia until the said information of the fourth. She had no cause before that; it was the sole cause. He asked her if he had done anything to make her leave; she answered No. He asked her if there was anything that he could do to keep her there; she answered no, only one condition, which was that he would separate her from his daughter.

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There is no other testimony except that of the defendant himself, who it seems was also examined, and it is not thought necessary to insert it here.

They were married; lived together three months; the wife left her husband under the above-mentioned circumstances, and sued him for divorce and alimony on the ground of extreme cruelty. The evidence does not show that there was any ill treatment whatever, much less any cruelty. As in such a case the question of the granting of a decree for divorce and for alimony, depends entirely upon the proof of extreme cruelty, if there is no proof of it, there should be no decree for either.

It is stated that the appellant has not appealed from the decree of divorce, but only from that of alimony. If he expects the latter to be reversed for want of proof of the charge of extreme cruelty, it is not seen how, under the statute invoked in this case, it can be expected that the former should stand. Under the statutory provisions applicable to this case, the evidence in support of one applies to the other; if it does not support the one, there is no foundation for the other. To affirm the one and reverse the other would simply subject the law to ridicule.

It is the duty of this court to examine the record; to reverse or affirm the judgment, sentence, or decree of the court below; to award a new trial in the court below, or to give such judgment, sentence, or decree as the court below ought to have given, or as to this court may appear according to law. Thompson's Digest, 449.

An appeal in chancery is substantially a re-hearing of the cause, and the appeal opens the whole case to the respondent, &c. 4 Florida R., 359.

Upon a careful consideration of the case as presented by the record, it is evident that neither the decree of divorce nor that of alimony ought to have been made. It is therefore ordered, adjudged and decreed that the said decrees are reversed and set aside, and this cause be remanded to the circuit court for re-hearing, consistent with this opinion as to law.

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WESTCOTT, J., delivered the following opinion in this case:

This case is one of no small importance; its effects extend to society at large; and while I concur in the judgment of the court, and am content with it, I desire to state my own views.

This is a bill by the wife against the husband praying divorce *a vinculo matrimonii*, alimony *pendente lite*, and permanent alimony, upon the ground of extreme cruelty. The answer denies the facts of the bill upon which the charge of extreme cruelty is based, and expressly avers that every means was used to contribute to the happiness and comfort of the wife, and that her separation and departure from the household of the husband was in the face of his repeated "remonstrance," and was a voluntary abandonment without a semblance of reason or excuse, and for which the wife herself gave no excuse except "that she wished to go back and live with Annie, then Mrs. Pooser, and the children, and that no other reason was ever assigned to him," the husband.

Following the answer appears this agreement:

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In the above-entitled cause, counsel for complainant and defendant have agreed that this court shall make a decree divorcing the parties from the bonds of matrimony, and that the questions of alimony, both permanent and *pendente lite*, with costs of court and counsel fees, be referred to a special master to take testimony, to be referred to this court at such time as this court may order.

J. B. DAWKINS,
T. A. McCONNELL,
C. P. COOPER.

Immediately following this agreement, and without any evidence, the following decree appears in the record:

"It is ordered, adjudged, and decreed that a divorce *a vinculo matrimonii* be granted in the above-entitled cause, and the

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master be and is hereby ordered to take testimony, and make his report in accordance with the above agreement on or by the rule day in February, in reference to alimony *pendente lite*, permanent alimony, costs of court, and complainant's counsel fees to be paid by defendant."

Following this decree appears the testimony of several witnesses, which has been stated by the court, and a decree allowing two hundred and fifty dollars for alimony *pendente lite*, two hundred dollars per annum permanent alimony, and three hundred dollars counsel fees, and one hundred dollars to the master for his compensation, and directing an execution to issue in favor of complainant's counsel.

From this decree an appeal is taken by the defendant. The decree of divorce in this case is made without reference to any testimony, but so far as the record discloses entirely upon the basis of the agreement of the counsel. All the testimony taken in the case appears upon a reference to determine other matters, such as alimony, and even if support for the decree could be derived from testimony taken upon a reference after the decree is passed, there is nothing here to support it.

This evidence does not establish cruelty. Evans vs. Evans, 1 Hag., 35; 4 Eng. Ec. Rpts., 310, 311; 7 Eng. Ec. Rpts., 114

Lord Stowell says: "What mere
few cases to be admitted
other actual

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quences of injudicious connection, must subdue by decent resistance or prudent conciliation, and if this cannot be done both must suffer in silence.”

It is unnecessary to make any further extract from this, a leading case upon this subject, or to refer to other cases, for the purpose of showing the utter failure of the proof in this record to sustain an allegation of cruelty, much less extreme cruelty, even though it could be made available to sustain the decree, which it cannot.

It is not required in this case to define accurately what constitutes legal remedy. It is enough that the evidence here does not establish what constitutes cruelty, even under its most loose definition in any respectable court.

In a late case reported in the American Law Review, it was held that “habitual drunkenness, a series of annoyances and extraordinary conduct, do not constitute legal cruelty.” *Brown vs. Brown*, Law Rep., 1 P. & D., 46.

This appeal taken from the decree for alimony, which is had under the 8th and 10th paragraphs of Sec. 3, Thomp. Dig., 223, (Duval’s Compilation, 81-83,) necessarily brings under review the decree for divorce.

The right of the wife to alimony has no common law existence as a separate independent right, but whenever found it comes as an incident to a proceeding for some other purpose, as for a divorce, no court in England having any jurisdiction to grant it where it is the only relief sought. Bish. M. & D., 352; 3 Atk., 547; 2 Ves., 191, 195.

There is no doubt from the language of this section (the 10th) that the alimony mentioned is an incident of the decree for divorce dependent upon the “nature” of the divorce suit, while under the 14th and 15th paragraphs of our statute, Thomp. Dig., 224, the alimony is not such as is incidental to divorce, but refers to support and maintenance of the wife under certain circumstances without forcing her to a divorce. This was the construction given to Secs. 14 and 15, in *Chairs vs. Chairs*, 10 Fla.,

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316. We cannot properly determine the propriety of the order for alimony under this section of our statute without looking at the whole record of the case, and determining the propriety of the decree for divorce upon which it is based, and when the parties appeal from the decree allowing alimony upon such a record as is now before the court, where it is substantially the same proceeding, they necessarily open the decree for divorce for our inspection; and the fact that the appeal is taken from the order for alimony alone would not justify this court in failing to reverse the decree for divorce, if it is clearly wrong.

In awarding alimony the law requires that "the nature of the case" shall be considered by the court; and while the proceeding for divorce is had under the 8th section, and the proceeding for alimony under the 10th, they *are in this case* but parts of the same proceeding, the one depending upon the other, both in the same bill. The decree directing a reference is based upon the agreement and the consent, and is a part of the same decree which orders "that a decree of divorce *a vinculo matrimonii* be granted." What I here say refers to alimony under the statute, and I do not propose to determine whether alimony *pendente lite* is referred to or the granting of it controlled by the statute. I examine this subject subsequently

The decree for divorce here is based upon an agreement of counsel without a particle of evidence to establish the charge, the answer at the same time denying the material facts in the bill.

"No decree of divorce from the bond of matrimony can be entered by the court upon the mere consent or agreement of the parties of record. There must be a complaint of due form, for a cause authorized by law, supported by due proof. 1 Paige, 276; 4 John. Ch'y, 501; 1 John Ch'y, 488; 2 Paige, 62; 3 Ed. Ch'y, 469; 1 Barb., 27; 16 Ark., 527.

Say the chancellors in 1 John Ch'y, 430, and in 1st Paige, 277: "To guard against all kinds of improper influence, collusion, and fraud, it is the policy of the law not to proceed upon the

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ground of the consent of parties to a dissolution of the marriage contract. It would be aiming a deadly blow at public morals to decree a dissolution of the marriage contract merely because the parties requested it."

There is a manifest difference between cases of this character and those ordinary actions where consent of parties can modify or control the action of courts. Ordinarily the court may enter a decree as desired by the parties, in the event it affects their interests alone. There is at least nothing improper in it. The language of the chancellors, above quoted, would seem clearly to establish the reverse of the proposition in suits of this character, and what is there stated clearly illustrates this difference. So far has this doctrine been carried that courts will not even sustain agreements in reference to the incidental matter of alimony until it is found on inquiry to be fair and equitable. 5 Paige, 509; 6 Haw. & J., 485; 4 Dess., 560.

What creates the difference is that the husband and wife are not the only persons whose interests are affected, or whose desires are to be consulted in suits of this character. 2 Bish., Mar. & Div., 234, 235.

The chancellor below should disregard their consents in the proceedings before him, and it is no less the duty of this court in this class of cases to disregard their wishes here, if in following their desires and restricting ourselves to the consideration of only such portion of the record as they call to our attention, we inflict a wrong upon the public, and give efficacy to a system of practice which, if continued, must result in disaster to the well-being of society.

Courts fail to do their duty, if by following the wishes of parties the continuance of marital relations is permitted to become a matter resting upon no surer basis than the fancies of those who have taken upon themselves their solemn and extended responsibilities.

It has been properly remarked that a divorce suit may be regarded as a civil suit between three distinct parties, the

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Government, the plaintiff, and defendant. It is the office of the Government to protect the interests of the public, the welfare of the entire community whose interests are involved, and to see that public morals are protected; and the rights of this party should never be forgotten by the court.

The only remaining questions are those connected with the allowance of *ad interim* alimony and costs, embracing counsel fees. The *ad interim* alimony, and the amount necessary to meet the expenses of suit in cases of this character, are given, not as of strict right in the wife, but it is a matter for the sound discretion of the court. Sir John Nicholl, in speaking of allotment of alimony pending suit, says: "It is in the discretion of the court, and that discretion is to be formed from an equitable view of all the circumstances of the case. I must look at the complexion of the case." This is the remark of the "High Court of Delegates" upon an appeal from the consistory court involving this precise question. 3 Phillimore, 394. See also 25 N. Y'k, 514; 2 Kent's Com., 98; 2 Paige, 115; 2 Bar. Ch'y, 146; 1 Paige, 274; 1 Barb., 430; 3 John. Ch'y, 519; 3 Ed. Ch'y, 387; 1 John. Ch'y, 108; 19 Ga., 265. The wife, having just ground for her action, is often without the means to maintain her suit. Without the favorable exercise of this discretion, she would be denied justice, and there are many cases in which this allowance should be made; indeed, the general rule is to allow upon motion or petition at the institution of the suit. What effect, if any, the 10th section of our statute has upon the application is thus made, in a case where the divorce sought upon the ground of extreme cruelty, I do not determine as that is not the case before the court.

In *Sheldon vs. Pendleton*, 18 Conn., 407, the court "When the wife is respondent, and defends herself again application of her husband, the practice is uniform to order to provide in case of her liability, funds for her defense we have never known such aid to be furnished her by the prosecuting party." While it is not my p

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pass upon the correctness of this view, or to determine the effect of our statute, or to express any opinion as to the proper doctrine on this subject, yet I do not doubt the rule as applicable to the facts of the present case.

This court has felt constrained to reverse the decree of divorce in this case. The basis of the decree is entirely improper, being the consent of the parties. It is not sustained by the proofs; and viewed in the most favorable light, the record discloses a state of facts which falls very short of justifying the decree. In this case the wife fails in her suit. These expenses were not allowed in the court below *until the final decree in the case*. The allowance for counsel fees is made in the final decree, from which this appeal is prosecuted, and the rule applicable to cases where the wife has brought her case to a hearing, and has failed, before an allowance for these expenses is made, must be applied. In such cases, independent of the statute, or any question under it, the rule is, that the husband is not liable for these costs. *Keats vs. Keats*, 1 Swab. & T., 334, 358; 2 Bish. Mar. & Div., § 388, 416. At the time that this order was made, it had been established by the proofs of the wife, who filed the bill, that she had no ground for divorce.

The next question raised by the record is the allotment of alimony *pendente lite*. Without deciding what may be the effect of our statute upon the subject an allowance during the pendency of the suit, for the support of the wife, *when the order is made before final decree*, the general rule where alimony is allowed as an incident to the suit, may be stated to be that where the wife, upon filing a bill for divorce, applies for an allowance *pendente lite*, and states a case requiring relief as to support, and the fact of marriage or cohabitation as man and wife is admitted or proved, the court may, in the exercise of a sound judicial discretion, pass an order for alimony *pendente lite* where the wife has not sufficient separate property, and the husband has faculties or ability, and where her case as stated would entitle her to a final decree. There are, however, excep-

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tional rulings, and indeed, it being to some extent matter of discretion, the action of courts has not been very harmonious.

In New Jersey, after petition for divorce on the ground of abuse and ill-treatment, a motion to allow maintenance *pendente lite* was refused against a party who had been declared a lunatic by the court, though the acts of abuse and ill-treatment transpired when he was not a lunatic, upon the ground that the order implies a default and neglect of a moral obligation on the part of defendant.

In New York, on a bill by a husband for a divorce, the wife will not be allowed alimony, nor will the court, on her motion, order her husband to advance money to enable her to defend the suit, until she has by her answer disclosed the nature of her defense. 3 John. Ch'y, 519. So the application of the wife for an allowance to enable her to make her defense and for alimony will not be granted, unless she denies in her petition, on oath, the truth of the charge of adultery, or shows therein some valid defense to the husband's suit. 2 Paige, 621.

It has been held in North Carolina, Vermont, and Massachusetts, that this allowance *pendente lite* cannot be made if there is a statute regulating the subject of divorce, and it is silent. 2 Dev. & Batt., 377; 10 Verm., 505; 19 Verm., 603; 2 Gray, 285; 8 Cush, 405. But see contra, 10 Ga., 477.

I have been unable to find any precedent where, under the circumstances disclosed in this record, the wife has been given this allowance upon final decree. This bill is brought by the wife upon the ground of cruelty. The bill, except in so far as it sets up the general conclusion of extreme cruelty, fails entirely to make out a case. The acts specified do not constitute extreme cruelty. This is necessary. 2 Paige, 112, 113; 4 Wis., 135; 27 Maine, 563.

The husband, in his answer, denies being guilty of any such conduct as charged in the bill. Upon the bill thus defective, and an answer in full denial, a decree of divorce is made by consent. The wife, who was examined, as a witness, states

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that while she was living with the defendant as his wife, she was annoyed *by information of others*, (which she afterwards says was the information of one person,) that she would be put out of the house by defendant's daughters during his absence; that there never was any other unpleasantness except this; and that the children demeaned themselves toward her a part of the time the same as if they were her own children; and she expressly states that the "*only and sole*" cause of her leaving was information brought to her by some one, (whose name she declines to disclose under advice of counsel,) that one of the daughters of defendant had stated that she intended to make her leave the house; and this information she states she did not convey to her husband. Before she left she says that defendant sat down on the bed with her, and "begged" her not to leave; that for fifteen minutes he used his efforts to get her to remain, and that he stated to her that she had better think more about the matter.

The husband, who was examined as a witness, states: "She seemed to be dissatisfied several days before she left, and I then tried to find out what was the matter with her; asked her if it was anything I had done to her. She said No, there was nothing. I then asked her if there was anything I could do to satisfy her. She said No. I then persuaded her with all the language that I was master of from that time up to the time she left. I told her it was disgraceful and shameful for her to act so; but she said she would go if she lived, if she had to walk."

In such a case as this, where neither from her bill, the answer of defendant, or her own statement as witness there is anything approximating unkindness on the part of the husband, much less cruelty, I am clearly of the opinion that the court should not have awarded alimony, either *pendente lite* or permanent upon the hearing when the whole case was disclosed.

As to allowance and alimony, the statute, 10 sec., par. 3, Thomp. Dig., 223, provides that when a divorce is decreed for the cause of extreme cruelty, the court may in every case take

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such order touching the maintenance and alimony of the wife, *or any allowance to be made to her, and if any*, the security to be given for the same, as from the circumstances of the parties *and nature of the case* may be fit, equitable, and just.

Whatever may be the rule where the wife's bill discloses merits, and her facts make a case which, if true, will entitle her to relief, and she applies before final decree, and when for the purposes of justice this subsistence is necessary, it cannot well apply to this case, where she has no such bill and no proof, and postpones her application for the order to a period when in point of fact she does not and cannot need subsistence during the suit, for the decree which awards it is the last act. 2 Bish., M. & D., § 425, 388, 416, 417.

In the case in 3 Phillimore, 394, the precise question under consideration was the allotment of alimony *pendente lite*, where it was two years before the wife applied for it in the consistory court. It was a case of great outrage and wrong upon the wife. The "High Court of Delegates," upon an appeal from the consistory court, say, "Considering that the wife was two years before she applied for alimony, we shall be disposed not to carry the grant back, but shall make it merely prospective."

If the wife postpones this application until after decree of divorce for extreme cruelty, or the decree or order is made by the court after the decree of divorce, the court must follow the statute, for it then certainly does control its action, and unless the nature of the case justifies it, and it is fit, equitable, and just, no order granting maintenance or alimony, whether retrospective or prospective, should be made; and this, as I understand it, is the view of Justice Hart.

At the institution of this suit it is not conceivable that the parties cohabit. It is legally improper for the parties to live in matrimonial cohabitation. It is a legal presumption that the wife anterior to this time, is able to obtain subsistence on the credit of her husband, and after the institution of such suit the presumption is that her ability to obtain subsistence on this

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credit ceases; hence, unless aided, she may suffer wrong for the want of subsistence to prosecute it; and hence, where she is unable to provide for her own subsistence and the husband has the means of supporting her, and it is probable that she may succeed, it is a matter of course in the practice of some States to require him to contribute of those means to furnish her with the necessary clothing and sustenance. 2 Sanford, chap. 146, 147; Bish., M. & D., § 406.

Where a wife, however, has sufficient property, this allowance is never made, because then the reason fails.

Under such circumstances as should properly enable a party to recover for necessities furnished the wife during the pendency of the suit for divorce, the husband is liable at law. 5 B. & C., 375; 1 Sand., 483. If the wife has furnished them herself, the court should not and cannot properly award them. If some other person has furnished them in a case of this kind, as it appears from the record, he should be left to his action at law, where his rights, if he has any, may be determined.

The wife cannot disregard her marital obligations, abandon her husband against his protests, and after fully developing such a case, have at the hands of the chancellor a decree for separate maintenance during the pendency of such suit. I do not understand that my associates differ with me in these views.

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1. It being a requirement of the statutes of this State that "no divorce from the bond of matrimony shall be granted to any applicant, unless it shall appear that such applicant has resided in the State of Florida for the space of two years prior to the term of such application," this fact must be alleged in the bill, and established by proof.

2. Where the bill omits this material allegation, and in addition to this omission it fails to set up a sufficient ground of divorce, as well as the par-

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ticular facts constituting the ground, no amount of testimony will justify the court in granting a decree of divorce *a vinculo matrimonii* upon it.

3. Where, after an appearance, the matter of such bill is taken for confessed in default of an answer, and a final decree of divorce *a vinculo matrimonii* is passed upon testimony, an appeal from the final decree opens for the consideration of the court the matters charged in the bill, and if the averment necessary to give jurisdiction of the person is omitted, and the matters charged in the bill are insufficient to sustain the decree, it will be reversed.

4. Where, upon the face of the bill, there is not sufficient alleged to justify a decree of divorce, the court should not, at any stage of the proceedings, allow to the wife means to compensate counsel to prosecute her suit. A *prima facie* case must at least be made in her pleadings before such an order is passed.

5. Permanent alimony is a continuous allotment of sums payable at regular periods. A gross sum of money given absolutely in full satisfaction, or a specific proportion of the husband's estate, cannot be given absolutely in full satisfaction of alimony.

6. Before a decree for permanent alimony is passed, there should be testimony sufficient to form an intelligent basis for such an order. There should be such testimony as would enable the court, with reasonable certainty, to do justice alike to the parties.

Appeal from a decree of the Judge of the Circuit Court for the Suwannee circuit.

The facts of the case, and the points of law arising upon the record, are stated in the opinion of the court.

J. P. Sanderson for Appellant.

C. P. Cooper for Appellee.

WESTCOTT, J., delivered the opinion of the Court:

Under the statutes regulating the subject, no divorce *a vinculo matrimonii* can be granted unless it is made to appear that "the applicant has resided in the State of Florida for the space of two years prior to the term of such application."

This fact should be alleged in the bill and established by

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proof, 1 John. Ch., 204; 14 N. H., 381; 8 N. H., 162. The allegations of the bill are very indefinite upon this subject. It alleges that complainant remained from her home in Fernandina, but omits to state where she was or when she left. It is then stated that in August, 1864, she was carried to Jacksonville by order of Brig.-Gen. Birney, where she was compelled to support herself and child, without stating how long she resided there or whether she was there until November, 1865. In November, 1865, it is alleged that she removed to Fernandina, from whence, it is not distinctly stated. She must have resided in Florida from May, 1864, while she could consistently with the allegations of the bill have been residing in Georgia from May, 1865, to November, 1865. Nor does the bill disclose where she was from May, 1864, to August, 1864. The allegations of the bill are therefore clearly insufficient in this respect. The bill must be so framed as to leave no room for construction or inference to the contrary.

The apparent grounds upon which the divorce is sought are “wilful, obstinate and continued desertion for the term of a year, and the habitual indulgence of violent and ungovernable temper.”

The bill alleges a marriage in Georgia in 1856. That in March, 1862, the defendant sent her into the interior of the State “out of the way of the Yankees;” that in August, 1864, she was brought to Jacksonville, by order of Brig.-Gen. Birney (from whence it is not stated;) that in November, 1865, she removed to Fernandina, (from whence it is not stated,) and that while in Jacksonville and in Fernandina she has supported herself and child without any assistance from the defendant.

There is no express statement that her husband was not with her in Jacksonville or Fernandina. These facts alone, if established, do not constitute an actual desertion or an intention to desert for a period of one year before the month of May, 1866, the date of the filing of the bill. The reasonable conclusion is that the wife was sent from Savannah to the interior of the

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state with her own consent to avoid the troops of the United States, and that subsequently she was carried to Jacksonville by them, from whence it does not appear. It is impossible to determine where she was in May, 1865, or whether her husband was with her or not. Desertion cannot be inferred from the unaided fact of protracted absence, in a case of this kind, and under these circumstances, where the wife left in the first place voluntarily and with the consent of both parties during armed contests. The desertion begins at the time when the intention not to return and the resolution to remain away is formed. There is no allegation here which fixes this period. In addition to these facts, there is a general charge of "wilful desertion for more than one year." This is not sufficient. The cause under the statute is "wilful, *obstinate*, and *continued* desertion, for the term of a year."

The allegations of the bill are therefore not sufficient to warrant a decree upon this ground.

The other allegation in the bill upon which the decree for divorce is based is to the effect that the defendant "habitually indulges in a wilful and ungovernable temper to such an extent that complainant cannot live with him in peace."

The ground of divorce under the statute is for the "habitual indulgence of *violent* and ungovernable temper."

The bill should state expressly that the husband indulges in violent and ungovernable temper *towards the wife*. It is no cause of divorce that he indulges in such temper towards others not in his family in her presence.

A right to divorce results to the wife under the statute only when she is the object of this temper, and the bill must so allege, and the facts should be stated as well as conclusions. 14 N. H., 381; 4 Wis., 135.

It is thus seen that this bill is entirely insufficient. What is charged does not authorize a decree for divorce, nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleading and evidence. Story's

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Eq. Pldg., Sec. 257; 7 Wheat., 522; 11 Peters, 229; 1 Bro. D. C., 94; 6 John., 543, 565.

The only remaining question upon this branch of the subject, **s**, Does the decree *pro confesso*, admitting that it is regular, which it is not, cure these defects in the bill?

A decree *pro confesso* results from a default in pleading. What its effect may be in other cases it is needless to inquire here, but defaults in cases of this character amount to but little.

No principle is known which should make a default effective to authorize a decree upon a bill for divorce not alleging sufficient facts to justify the decree. This jurisdiction in matters of divorce *a vinculo matrimonii* for causes subsequent to marriage, and without denying the validity of the marriage, is a special jurisdiction conferred by statute. No court in England had this power before 1858, and since then by statute it is permitted only to a limited extent, and no such thing as a divorce *a vinculo* was known at common law except for causes which made the marriage invalid in its commencement.

While the statutes of this State require that the practice in this class of cases shall be as in other causes in chancery, it does not give like effect to defaults or to decrees *pro confesso*. These defaults may be entered and decrees be had in conformity to the rules of chancery practice, but there is a great difference in their results, and it would be deplorable if such was not the case.

It was held in Johnson vs. Johnson, 4 Wis., 135, that "when the bill is so defective as to fail in setting out a legal cause for divorce, no amount of evidence nor the verdict of a jury will warrant a decree upon it;" and that "a general charge of cruel and inhuman treatment is not sufficient when the facts and details specified as constituting the charge fall short of sustaining it." 16 N. J., 391; Pinkney vs. Pinkney, 4 Iowa, 325; 27 Maine, 563; 2 Paige, 112.

This is equally as material a consideration in this case as the omission to allege the required residence.

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But we are not without express authority in the United States, where this practice of divorce *a vinculo* for causes subsequent to marriage has grown up under statutes, upon the precise question of the operation of a default and consequent decree *pro confesso* in these proceedings.

In Pinkney vs. Pinkney, 4 Iowa, 324 the court held that a petition for divorce should distinctly state the facts constituting the cause, and should show *prima facie* that the complainant is the injured party, before a divorce is decreed by default.

In Illinois, where under the statute it was provided that in all cases for divorce, if the bill or petition be taken for confessed, the court may proceed to examine the witnesses and have a hearing, this matter was expressly decided and the operation of such a decree fixed. Trumbull, J., in Shillinger vs. Shillinger, 14 Ill., 150, says, "It is clear that a court has no authority to decree a divorce on a bill being taken for confessed, without proof to sustain allegations; and in this respect a proceeding for divorce differs from an ordinary suit in chancery, for in the latter case it is discretionary with the court when a bill is taken for confessed to hear testimony or not in its support. The court may refer the cause to a master, as in this instance, to take the proofs and report the facts, and the facts to justify granting the divorce must be proven to the court; and it would be erroneous to grant the decree, on taking the bill for confessed, without any evidence, and if, as in this case, the whole evidence on which the court acted is set out in the record, and it is insufficient to have warranted the decree, it will be reversed."

In this case, although the statute expressly conferred the power upon the chancellor to examine witnesses and proceed to a hearing, the court, after decree *pro confesso* upon a sufficient bill, examined upon appeal the entire record, and reversed the final decree for matters *subsequent to the default*, although the chancellor had acted in strict conformity to the statute.

This is one of the many differences between divorce suits and other chancery cases, which has led most elementary writers to de-

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signate it as a suit *sui generis*; and this, like many other of its peculiar incidents, arises from the fact that the public have an interest in these suits, and the duty of the court is to protect that interests even at the expense of the wishes of the parties themselves.

We proceed to examine the other portions of the decree as distinct from the decree of divorce proper; and first, the matter of fees awarded the solicitor in behalf of the wife.

In 2 Paige, 454, it was held that no allowance for costs or alimony should be made to the wife, if it appears from the face of the bill that she can obtain no decree thereon. In 8 Wendell, 370, the same rule is announced. That portion of the decree awarding costs for the wife's solicitor should be reversed. The principal decree is reversed upon grounds attributable to the want of care in the solicitor in drafting the bill, and it should not be permitted that the husband's estate should be subjected to all expenses of litigation, whether regular or irregular. 8 Wendell, 370. "It might be very gratifying to the cupidity of a captious solicitor, who should be more intent on making money out of family dissensions than bringing their difficulties to a speedy adjustment, to try experiments in practice, and subject the husband's estate to all expenses of litigation, whether regular or irregular, and no husband should be subjected to such legalized depredations." 8 Wendell, 370. These remarks I do not introduce from anything that appears in this particular case, nor have I the least reason to attribute any such thing to the solicitor in this cause. It is the language of a learned court, and it is inserted to show what great abuses might be practiced under a contrary doctrine. As a general rule, if the case made by the bill drawn by the attorney is not a good one, and that fact is plain, the husband should not be made to pay for such labor, even when the application for the order is made before final decree, nor should he be made to pay for any labor of a subsequent attorney who proceeds to a hearing upon such bill, especially where the wife fails upon an appeal. He should have amended

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the bill or asked leave to file a supplemental bill. 3 Ed. Chy., 387; 1 Hast., 471; 2 Bish., M. & D., § 406, 416.

This allowance is not a matter of right in the wife. It is a creature of the ecclesiastical courts, the purpose of which is to aid the wife to have justice done when she is without means, and makes a *prima facie* case in her pleadings; and is never awarded when the wife fails in her suit, and the making of the order for it is postponed to the hearing.

The next subject is the matter of permanent alimony to the wife.

There appears to have been no decree for alimony during the suit, but a final decree for the sum of two thousand dollars for "alimony and separate maintenance." This it is presumed was intended to indicate permanent alimony, and it cannot be sustained for two reasons.

Permanent alimony is not a sum of money or a specific proportion of the husband's estate given absolutely to the wife. It is a continuous allotment of sums payable at regular periods for her support from year to year. 5 Eng. Ec., 126, 129; 7 Dana, 681; 4 Hen. & Mun., 507; 4 Rand., 662; 4 Green, Iowa, 26.

Not only is there error in this respect, but there is manifest error in another.

The amount of alimony is not regulated by any absolute fixed rule; it is matter of discretion with the court, and that discretion is not arbitrary, but a judicial discretion, to be exercised upon an equitable view of all the circumstances of the particular case. 7 Hill., 207; 10 Ga., 477; 3 Phillim., 378; 22 Ill., 187.

The actual income of the husband appears from the cases to be as a general rule the precise fact to be regarded. 2 Hag. Con., 199, 201; 3 Hag. Ec., 472; 5 Eng. Ec., 186; 2 Phillim., 40.

But this is not a fixed and absolute rule, and there are circumstances which vary it. Before an allotment of permanent alimony is made, the ability of the husband should be made to appear, as well as the other considerations which are to be estimated in connection with his faculties, in determining the amount.

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What is the testimony in this case?

The first witness states that he does not know Mr. Phelan's circumstances. The next witness, a son of complainant, testifies that he seems to have a grocery and provision store, with some dry goods. His circumstances, pecuniarily, seem to be easy. He is at the present time building a store, although I believe he is doing so in his married daughter's name. The next witness says, Mr. Phelan seemed to be comfortable in his circumstances. He kept a store in Fernandina, and was building a store-house, which has since blown down. One says he has understood he owns railroad stock or bonds, but does not know the fact.

The master, upon this testimony, reports his conclusion to be, that William Phelan is now merchandizing in Fernandina, and *appears to be* the owner of real estate in said city, and is *believed* by witnesses, from *common report* and from all *appearances*, to be in easy circumstances, the actual amount of means not being known definitely.

This is not sufficient to arrive at any accurate conclusion. It amounts to but little except that defendant has a provision and grocery store. Whether he has one thousand dollars income or twenty, is not disclosed, and there is nothing in reference to various other matters which should enter into the estimate.

The cases of allotment of alimony where the husband was a merchant are numerous, and the general rule applicable could be readily applied. The testimony here is not sufficient to come to any conclusion which could, with reasonable certainty, be just either to the husband or wife. There must and should be an intelligent basis for such an important order of this character, which provides in future a fund for the support of the ~~past~~ wife, and which levies upon the estate or faculties of the ~~late~~ husband an annual sum in discharge of his obligation.

For the want of an intelligent basis upon which to make the order, the allotment of the sum of three hundred dollars per annum for the support and maintenance of the infant must also be reversed.

SUPREME COURT.

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This court has decided that in all cases of divorce it is proper to grant alimony, "the right to decree alimony being held to be an incident to the power to grant divorces, (Chairs vs. Chairs, 10 Fla.;) and the 10th section of our statute provides that when a divorce is granted "on account of the parties being within the prohibited degrees, or for the cause of adultery, or extreme cruelty," the court may in every case take such order touching the care and maintenance of the children as may be just. The divorce here sought is not for the grounds mentioned in that section, and the question arises whether, independent of statutory regulations, this matter can be considered in this case and in this form. But it is unnecessary to decide this point in this case.

It may not have been necessary to have passed upon any portion of this case, except the bill, as its character required a reversal of the decree, but I have, for the benefit of both parties, examined the record, and pointed out such apparent errors as were plainly disclosed, and in order that such defects might be corrected if there was merit in the case, and it was prosecuted further.

In this case, although the wife has failed in her suit, she should recover the statutory taxable costs. Courts will not ordinarily, if they have any discretion in the premises, decree these costs against a defeated wife. The decree in such case continues her disabilities as a *femme covert*, and she should not be encumbered with the responsibilities of a *femme sole*. Dana, 52; 29 Ga., 281; 2 Paige, 454; 4 Porter, 479.

It is ordered, adjudged, and decreed, that the decree entered in this case be reversed, except so much of it as adjudges taxable costs of the court against the defendant in the below; that this cause be remanded, with leave to the plaintiff to dismiss her bill without prejudice, or to amend her bill and for such further proceedings in accordance with the principles of equity.

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HART, J., delivered the following concurring opinion:

This is a cause in chancery for divorce, and is appealed from the Circuit Court in Nassau county when that county was in the Suwannee circuit under the late government of the State. The appeal was taken generally, after final decree, within the time allowed by law for the taking of appeals in chancery, and was made a supersedeas by order of one of the justices of the Supreme Court.

The bill was filed May 17, 1866, and alleges that the complainant was married to William Phelan, also a citizen of said county, in Savannah, Georgia, on or about the 21st day of April, 1856, with whom she continued to live as his wife until the 3d of March, 1862, when he sent her into the interior, pretending that he would follow her, which he failed or refused to do, and never supported her afterwards. That she remained from her home in Fernandina, depending entirely on her own resources, until August, 1864, when she was brought to Jacksonville by military order, where she was obliged to support herself and child, though he was able to furnish her with ample means of support, and could have done so without injury to himself. That in November, 1865, she returned to Fernandina, where she has ever since resided and supported herself and child, he refusing to aid or assist her in any way or manner. That she has in her possession one child, viz.: Anne Belle Phelan, about nine years of age, whom she has supported and educated without his aid. That he habitually indulges in a harsh and ungovernable temper; is, therefore, incapable of taking care of and educating said Anne Belle. That he is possessed of and owns considerable property, out of which he could support her and his said child, which he has failed and refused to do. That he wilfully deserted her for more than one year prior to the filing of this bill, and still remains wilfully absent from her society. That he habitually indulges in a wilful and ungovernable temper, so much so that she cannot live with him in

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peace, and that he is totally incapable of educating her said child, the said Anne Belle. That he ought to be compelled to support her and his said child.

The subpoena was issued, served, and returned on the day of the filing of the bill. There was no answer filed in the cause, and there was what was deemed to be a decree *pro confesso*, and an attempt to take and produce testimony and the report of a master, which will be the objects of some further consideration. A document appears which was claimed to be a decree of divorce, of alimony, and expenses and costs, which may have been made after these steps were taken, but it is without date, or any evidence of being filed or "delivered in open court." It is as follows:

"It is ordred, adjudged, and decreed in the above-entitled cause that the complainant and defendant be divorced *a vinculo matrimonii*, and that the marriage hitherto existing between them be and the same is hereby declared null and void. It is further ordered, adjudged, and decreed that the defendant pay to complainant two thousand dollars for her alimony and separate maintenance, and that execution do issue for the same against the goods and chattels, lands and tenements of said defendant in favor of complainant at the expiration of ten days from the date of this decree, if not paid or satisfied by or before the expiration of said time. It is further ordered, adjudged, and decreed that defendant pay to complainant the sum of three hundred dollars per annum for the support, maintenance, and education of their infant daughter, Anne Belle Phelan, until she shall attain her majority, or be united in lawful marriage before she thus attains her lawful age; and that until she is married or thus attains her majority, her said mother, Sarah Phelan, the complainant, be and is hereby appointed her lawful guardian, and have charge, control, and custody of her person and education. And that the defendant be and is hereby ordered, adjudged, and decreed to secure the payment of said annual amounts of three hundred dollars by giving good and sufficient securities

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unto said complainant as guardian as aforesaid, under penalty of being in contempt of this court. It is further ordered, adjudged, and decreed that said defendant pay or cause to be paid unto Charles P. Cooper, solicitor for complainant, the sum of three hundred dollars for his fee in the premises, and that execution do issue for the same against the goods and chattels, lands and tenements of said defendant in favor of Charles P. Cooper, solicitor as aforesaid, after the expiration of ten days from the date of this decree, if not sooner paid and satisfied. It is further ordered, adjudged, and decreed that the defendant pay all the legal costs in said case laid out and expended, and the fee and compensation of the master in chancery in and about the same, to be taxed at twenty-five dollars, to be included in the costs to be taxed up in said cause, and to be collected by execution in the said matter against said defendant in manner and form as provided by law for the collection of costs in suits at law and decrees in chancery from parties against whom judgments at law have been rendered or decrees in chancery pronounced."

The petition of appeal is substantially as follows, properly dated and filed:

To the Honorable E. M. Randall, Chief-Justice, and Associate Justices of said Court:

The petition of William Phelan, appellant, humbly presents the following causes for appeal and exceptions to the decree rendered against him in Nassau county, now in the Fourth Judicial Circuit, and your appellant would show unto your honors.

1st. That in the rendition of the judgment *pro confesso* he was taken by surprise; that he and his solicitors supposed that the bill for divorce was dismissed, for at the first term, upon the sounding of the chancery docket, the judge announced that the solicitor of appellee who had filed the bill could not practice in his court, and that unless some other attorney appeared for

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ier, the bill would be dismissed; and no other attorney appearing, he and his solicitors supposed that said bill was consequently dismissed.

2d. That he and his solicitors at December term, 1867, following, discovering that a judgment *pro confesso* for want of an answer as taken without notice by C. P. Cooper, Esq., as solicitor for said appellee, during vacation his solicitors spread a motion on the motion docket to open said decree *pro confesso*, and frequently applied to the judge and urged him for a hearing upon said motion to open said decree; but that his honor did not grant the same, and that a final decree was pronounced at said December term, 1867, without the said motion being heard or disposed of.

3d. That no actual marriage was proved, as indeed it could not be, the appellee in her bill not even daring to sustain such an allegation by her oath. That proof of cohabitation could not be sufficient evidence of marriage in this case, as it will appear by appellee's bill and evidence that they had not cohabited for over five years.

4th. That if cohabitation had been proved, it should not be received in proof of marriage in this case, as it would involve the proof of an offense, from the fact that his wife, to whom he was lawfully married nearly thirty years ago, is still living and undivorced, and that he is in constant correspondence with her.

5th. That he being aged and very feeble, and his circumstances very contracted, being barely able to obtain a support for himself, the alimony decreed, with counsel fees, &c., is exorbitant and excessive, and altogether beyond his ability to pay.

6th. That he has a good and meritorious defense to said bill of divorce, that he was never married to appellee; that he so instructed his solicitors, and well supposed that they would have pleaded to and defended said cause; but that through surprise or negligence they failed to plead or answer, and are considered irresponsible persons against whom he could never e

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pect to receive any pecuniary redress from any damage he might suffer in the premises.

7th. That the evidence before the master was taken *ex parte*, and that Mr. Spaulding, one of the witnesses, is the son of the appellee.

8th. That upon the return of the master's report, no note thereof was made in the chancery order book as required by the rules of court, and he had no notice of the same.

9th. That he did not have his day in court.

10th. That there is no day or date to said decree.

11th. That there is properly no evidence before your honors in said cause, inasmuch as it does not appear from any note or memorandum on the papers containing the evidence taken by the master as filed in the cause, that such evidence was read at the final hearing, as required by the rules of court.

12th. That January 27th, 1868, he filed his bill in the nature of a bill of review impeaching said decree for fraud, and asking, with other relief, for a writ of injunction to stay further proceedings, and that the same might be set aside, and was refused.

13th. That he, upon said injunction being refused, dismissed said bill, and filed his petition for a re-hearing in the original cause for divorce, which re-hearing was also refused.

14th. That said decree is contrary to law, equity, and good conscience.

There are papers in this record which are claimed to be notices, a bill in the nature of a bill of review, dismissal, a petition for re-hearing, motions, orders, &c., which are so informal and deficient of important requirements as not to attract special consideration, especially as the decisions of the case rests upon others more particularly specified.

The proceedings of appeal are regular, and the petition of appeal, assigns errors. An appeal from a final decree in chancery, or any appeal properly operating as such, has the legal effect of causing in this court substantially a re-hearing of

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the whole case. This court, therefore, is warranted in considering the whole record, and if any material error shall be found to have been committed, it is its duty to have it corrected.

The record is very deficient in dates and descriptive headings, and the court cannot see at what term or terms of the circuit court some of the most important steps were taken, or at what times some of the most important documents were filed. It is also very defective in showing whether or not documents required by law to be placed upon the order book are there. There is not a motion, notice, order, report, or decree in the record of the circuit court proper, that conforms to the long established formulas prescribed in these very important proceedings in chancery. If a more perfect record should be required, it is doubtful if it can be obtained, and should the court dismiss the appeal for the non-conformity to the requirements of the rules of pleading and practice, it may be that a precedent will be left standing that the public is deeply interested in correcting.

In cases at law or chancery where judgments for money or other property is all that is sought, the law of pleading and practice wisely leaves much to the action of the parties themselves; and whilst ample facilities are afforded for the attainment of justice, if the parties do not see fit to avail themselves of them, it may properly be considered as their own fault, and the court will not interfere. In cases of divorce, society is more nearly interested, and it has been wisely held that the public may properly be considered an interested party to be remembered by the court, and its interests guarded and protected. It not unfrequently happens that both the immediate parties are willing to the divorce, and that the only earnest contest is over the question of money by the name of alimony; and, as a result, the pleadings are neglected except for that purpose alone; and *that* neglect is precisely what affects the interests of society. If one neglects to allege a *lawful* marriage, with the necessary and sufficiently certain allegations of time and place, and the other,

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willing to have the sanction of a judicial separation and anxious only about the amount of money involved in the case, neglects to plead, answer, or demur as to those points, if the court is not wise and watchful it may be entrapped by some show of evidence into granting a decree "*a vinculo matrimonii*," in a case in which there never was a marriage, and the immediate parties have been for years criminally cohabiting, and thus neither of them entitled to relief, the judiciary subjected to blame and ridicule, and society injured.

Joel Prentiss Bishop, in his admirable commentaries on the law of marriage and divorce, discusses this subject with great learning and ability, and remarks as follows: "It has already been sufficiently shown in the foregoing pages that not only the parties but the public also have an interest in marriage and its dissolution. Growing out of this two-fold interest we have the doctrine running through all matrimonial suits and bringing into subserviency all other law on the subject, that the proceeding, though upon its face a controversy between the parties of record only, is in fact a triangular suit, '*sui generis*,' the government or public occupying the position of a third party without counsel, it being the duty of the court to protect its interest." See 2 Bishop, 230.

It is not consistent with any of the authorities, to lay down the law to be, that the bill must in every case allege enough with legal certainty on every material point to support legal proof, which must also be made to satisfy the conscience of the chancellor, that there was in point of fact a lawful marriage, duly solemnized, else the court has no power to grant a decree of divorce from the bond of matrimony whether the bill is demurred to or not. 5 Fla. R., 560. The bill must set out a sufficient cause of divorce, else the court cannot entertain it. 27 Maine, 563. Where it does not, even if a jury find a verdict upon it, no judgment can be rendered thereon. 4th Wis., 135.

This bill alleges "that complainant was married to William Phelan in Savannah, Ga., on or about the 21st of April, 1856."

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This allegation is uncertain as to identity of the William Phelan who is the defendant in this suit, uncertain as to its having been a lawful marriage, and wholly deficient as to the facts and circumstances of the solemnization. They are not sworn statements, and if they were, the temptation to evasion or mental reservation is sometimes so strong in such cases as to make the court very watchful. The words "*on or about*" used thus in such a case are unsatisfactory, and are deemed to be too uncertain. See Story's Eq. Pl., par. 23. Uncertainty in allegation will be most strictly construed against the party making it. 10 Fla. R., 179.

It is objected to this bill that it does not contain an allegation that complainant has been a citizen or resident of the State for two years prior to the filing of her bill; and it is argued that without this averment the court cannot take jurisdiction of the case, and that where there is a limitation or restriction upon the jurisdiction of a court, such facts as are necessary to give jurisdiction must appear on the face of the record, and if they are wanting, advantage may be taken of it at any stage of the proceedings, even in the appellate court.

The act of 1852, chapter 522, says: "No divorces from the bonds of matrimony shall be granted to any applicant unless *it shall appear* that such applicant shall have resided in the State of Florida for the space of two years prior to the time of such application." It seems very clear, that unless the applicant has been a resident of the State for two years prior to the application, the court has no authority to decree the divorce.

This is jurisdictional. The bill must show the authority or jurisdiction of the court, or the action of the court will be nugatory. A judgment or decree rendered where jurisdiction or authority is wanting is utterly void. "*Secundem allegata et probata*" obtains.

It is also objected to this bill that the child for whom support and education is prayed is not alleged to be the offspring of the defendant, and that there is not a sufficient averment of the

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ability of the defendant to respond to a decree of alimony, and of regular payments for the child. The first one of these two objections involves the question as to whether or not this allegation is stated with sufficient certainty. "Care should be taken to frame the stating part of the bill fully and accurately." Story's Eq. Pl., par. 27.

"Uncertainty in a bill may arise in various ways * * * The case intended to be made may be certain, but the allegations in the bill may be so vague and general as to draw with them the consequences and mischiefs of uncertainty in pleadings. Some of the material facts may be stated with sufficient certainty, and others again with so much indistinctness or incompleteness as to their nature, extent, date, or other essential requisites as to render inert or inefficient those with which they are connected, or upon which they depend; in each of these cases the effect may be fatal to the objects of the bill." Story's Eq. Pl., par. 242. "Every fact essential to the plaintiff's title to maintain the bill and obtain the relief must be stated in the bill, otherwise the defeat will be fatal." Ibid. 257; 5 Fla. R., 560; 1 Daniel, 411, and note, 422 and 2. There is no direct allegation that the child is his offspring; it is incidentally mentioned as "his child," but that is not an allegation of the fact. Correct forms of allegations of this nature may be found in 2 Bishop, 539 and 777. In some cases of appeal this might not alone be a fatal defect, nor is it decided so to be in this case; but to the candid legal mind the reason for considering it to be a defect is obvious.

Upon the subject of the second of said last-mentioned objections, it is found that there is some variety of judicial opinion as to the bearing and effect of the question of the husband's ability to respond to a decree of alimony, what kind of property it should proceed from, and whether from property accumulated after decree, or only from that which was possessed before. There can be no serious question of the soundness of the doctrine that "the duty of the husband to support his wife does not de-

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pend alone upon his having tangible property; that while they are living together they are bound to contribute by their several personal exertions to a common fund which in law is the husband's, and from which the wife may claim a support; that if she is compelled to seek a divorce on account of his misconduct, she loses none of her rights in this respect, only she is to draw her maintenance in a different way, that is, under a decree for alimony based, if he has no property, upon his earnings or ability to earn money." 2 Bish., 446. In considering these questions the sounder doctrine appears to be that alimony, when decreed, is a charge upon the estate or property of the defendant, whether of lands, goods, and chattels, or income, without regard to the time of his acquiring them, until the court, for good cause correctly alleged and proved, shall modify or dissolve the decree, or until it shall be reversed; and that like a judgment at law the decree passes whether the defendant has any property or not. If the complainant correctly alleges and proves that the defendant has property or income, the court may act upon it in making the decree. If the husband has been guilty of the grave offenses against the law for which divorces are allowed, he has voluntarily subjected himself to the just burdens of such a decree, and cannot rightfully complain. The injured wife and helpless offspring are justly entitled to all the aid of legal process to enforce that support of which they have been so deprived. Process may or may not be able to find or reach it, but that is no objection to the making of the effort. If he meets the requirements of the decree, and furnishes the reasonable maintenance and support, process from time to time may not be required.

The allegations of statutory causes set forth in the bill are not made with that conformity to the intention of the law that is necessary in such cases. It alleges that the defendant "habitually indulges in a harsh, ungovernable temper; that he habitually indulges in a wilfull and ungovernable temper." The corresponding clause in the statute prescribing the cause of divorce is, "for the habitual indulgence of violent and ungovernable

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ble temper.” Thompson’s Digest, 222. A wilful and ungovernable temper is not necessarily a violent and ungovernable temper. Violence of some kind calculated to inspire terror or produce a fear of personal injury was evidently intended to be connected with the ungovernable temper as constituting this cause for divorce. It alleges that he “wilfully deserted her for more than one year prior to the filing of this bill, and still remains wilfully absent from her society,” the corresponding cause of divorce prescribed by the statute being, “for wilful, obstinate, and continued desertion for the term of a year.” The statute does not make a wilful desertion that may not have been continued, but may have ended and occurred again, nor a wilful absence which may not necessarily constitute “obstinate desertion for the term of one year,” a cause or causes of divorce. The statute is plain, comprehensive, and explicit, and in a case that really comes within it, it is not difficult to make the allegations conform to its language and plain meaning.

The bill was filed and subpoena served May 17th, 1866. The first Monday in June or July may have been return day, and defendant was required by law to enter his appearance on the rule day next after return day, and to file his plea, answer, or demurrer on the rule day next succeeding that of entering his appearance, which may have been August or September, in default whereof “the plaintiff may at his election enter an order (as of course) in the order book, that the bill be taken *pro confesso*.” Thompson’s Digest, 457. Did the plaintiff do it? There is nothing in this record purporting to be from the order book, docket, or files, that is even claimed to be any evidence whatever of the defendant having by himself or solicitor entered his appearance, or of his having at any time filed a plea, answer, or demurrer, except documents that he substantially filed in efforts to get rid of the decree wherein he stated that his appearance had been entered. If this appearance was entered, still it is not claimed that any plea, answer or demurrer was ever filed for him. Now did the plaintiff elect to enter, and enter, “an order

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(as of course) in the order book that the bill be taken *pro confesso*? For the supposed fact that he did so was the foundation of several important proceedings in that, and of considerable argument in this court, and is thought to be of great importance in the case. The only document in this record that is claimed to have been, or to be such, is as follows:

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“Plaintiff, by her attorneys Cooper and Bisbee, and defendant by his attorneys Livingston and Friend. No answer being filed, decree *pro confesso* was granted, and referred to a master. Dec. 17, 1866.”

It has no statement of being before any court, no signature, nothing to show that it was entered in the order book, contains no language of an order, and by its language it implies that a decree *pro confesso* was referred to a master. Clearly it is not “an order entered (as of course) in the order book that the bill be taken *pro confesso*.” It cannot be correctly considered to be a decree *pro confesso*, nor made the basis of any subsequent proceedings as such. Nor is there in this record, any order from the order book or elsewhere, referring the bill, or any part thereof, or any subject involved therein, to a master for any purpose.

There are statements of three men, purporting to have been subscribed and sworn to before another who signs himself master in chancery, and these statements are claimed to be the evidence in the cause. They are without date, or note of filing, or of having been read in evidence, nor are they entitled as being before any court. Thus the document is presented without any of the important attending insignia required by the law in order to give it the dignity of a document containing legal evidence in a cause. Looking into it, however, it is found to contain no attempt to obtain proof of any marriage except by cohabitation and recognition by defendant.

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that way, and from papers that may be letters of defendant to complainant during virtual cohabitation; unsatisfactory statements tending to show “the indulgence of habitual ill and ungovernable temper;” opinions of defendant’s unfitness to raise a girl child; and statements attempting to show abandonment of complainant by defendant.

There is a document purporting to be a report of a master in Chancery, also without date or note of filing. The judges of the Circuit courts in their respective circuits are authorized by statute to appoint as many masters in chancery as they may find necessary, who shall receive the appointment in writing from the judge, which shall be recorded in the minutes of the court. He shall take the official oath before proceedings to discharge any of the duties of the office, and such oath shall be entered at full length on the order book. Thompson’s Digest, 463. All this may have been done, but this court is in no manner informed of it. If it were done, or even if it were shown by the record that the judge of the circuit court had recognized this man as a master in chancery, ordinarily this court could generally presume him to be such; but when no appointment, nor qualification, nor recognition of him by that judge is shown, this court cannot supply the deficiency. The statute provides that the report shall be filed by the clerk and the return thereof noted in the order book. Thompson’s Digest, 465. This secures to the parties access to it, and notice of it; but nothing of this kind is shown by this record to have been done with it, and for these reasons, deemed to be important, this document cannot in my opinion legally be adjudged to be official.

As it does not appear that “the plaintiff entered an order in the order book (as of course) that the bill be taken *pro confesso*,” nor that a final decree was pronounced at December term, 1867 the error assigned in the second ground in the petition of appeal cannot in my opinion be considered to be well taken.

For the reasons stated at large in this opinion, the errors assigned in the third, eighth, ninth, tenth, eleventh, twelfth, th

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teenth, and fourteenth grounds in the said petition are in my opinion well taken.

HENRY SLABACK, APPELLANT, vs. LEOMA L. CUSHMAN. APPELLEE.

1. The proclamation of the President of the United States of January 1, 1863, known as the Emancipation Proclamation, was a military order founded upon a supposed military necessity, in a time of war, and became operative only when the Federal Government was enabled by the power of arms to enforce it.

Appeal from the Circuit Court for Santa Rosa county.

Statement of the case by RANDALL, C. J.

This was an action of assumpsit commenced in 1866, by the appellee, to recover for the services of a negro woman, let to hire by the appellee to the appellant, from October 20, 1863, to March 20, 1865. Pleas, non-assumpsit; and further, that the woman for whose services the plaintiff claims was a freedwoman at the time of the hiring, by virtue of the proclamation of the President of the United States and the results and effects of the war then prevailing, and the services rendered were contracted for with the freedwoman, &c.

At the trial the court charged the jury that if the defendant hired the negro woman of the plaintiff in October, 1863, plaintiff is entitled to recover for such time as he had her service, as extending beyond the time named in the bill of particulars may have been agreed upon. And if they beli

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authorities, then the plaintiff could not be entitled to recover after that time, but no voluntary payment by defendant to the woman would exonerate him.

Defendant asked the court to charge the jury, that at the date of the hiring in this case, the negro woman hired was a freed-woman and not a slave, by virtue of the Emancipation Proclamation of the President of the United States, which took effect January 1, 1863, and therefore the plaintiff is not entitled to recover any hire in the case, which charge the judge refused to give, on the ground that he was asked to charge upon the facts of the case. To which ruling the defendant excepted.

Verdict for plaintiff, appellee, for \$136, and defendant prosecutes a writ of error, and assigns errors as follows:

1. The court below erred in refusing the instructions asked for by the appellant on the trial.

2. In refusing to take judicial notice of the proclamation of the President of the United States known as the Emancipation Proclamation.

E. W. Jones, for Appellant.

In this case, the only question is as to the propriety of the ruling of the court below as to the instructions asked for by the defendant's counsel.

The ruling of the court below was based upon the supposition that the proclamation of the President was matter of fact.

The court should have taken judicial notice of the proclamation without formal proof. 12 Greenleaf's Ev.; 11 Vesey, 292; 3 M. & S., 67; Sim., 213.

As to the legal effect of the proclamation, I insist that the court should follow the decision of the political department of the government. 4 Cranch., 241; 2 Peters, 367; Williams vs. Suffolk In. Co., 13 Peters; Garcia vs. Lee, 12 Peters.

No counsel for Appellee.

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RANDALL, C. J., delivered the opinion of the court:

The question presented by the record for our determination is, as to the effect of the "proclamation of emancipation" issued by the President of the United States on the first day of January, A. D. 1863. On that day the President of the United States issued a proclamation reciting that on the 22d day of September, A. D. 1862, he had issued a proclamation announcing "that on the first day of January, 1863, all persons held as slaves within any State or designated parts of a state, the people whereof shall then be in rebellion against the United States, shall be then thenceforward and forever free; and the executive government of the United States, including the military and naval authority thereof, will recognize and maintain the freedom of such persons, and will do no act or acts to repress such persons, or any of them, in any efforts they may make for their actual freedom;" and further, that on the first of January, 1863, he would by proclamation designate the States and parts of States, if any, in which the people thereof, respectively, shall then be in rebellion against the United States. And designating the States and parts of States in which the rebellion existed, the proclamation says that, "as a fit and necessary war measure for suppressing the rebellion," "and by virtue of the power and for the purpose aforesaid, I do order and declare that all persons held as slaves within said designated States and parts of States, are and henceforward shall be free, and that the executive government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons." "And upon this act, sincerely believed to be an act of justice, warranted by the Constitution upon military necessity, I invoke the considerate judgment of mankind," &c.

The State of Florida is one of the States designated, in which the said rebellion existed. The courts of the several States and of the United States have judicially recognized the late insur-

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rection and rebellion by the people of a portion of the States of the Union, as a civil war, and have so recognized many of the measures taken by the military authorities of the United States in conducting the war.

The question arises, however, whether the proclamation of a military commander, under the laws of war, has a present legal effect upon persons beyond the lines of military occupation by the power from which the proclamation emanates.

The Supreme Court of Alabama has held that it "had no force or validity until the Federal Government was enabled by conquest or the power of arms to enforce it," and "that the institution of slavery was destroyed by the act of war." 40 Ala., 524.

Personal property within an enemy's country may be taken by military order, and the owner's title thereby divested, but the right of owners is not divested until actual seizure and appropriation.

In time of peace the President, with or without the sanction or authority of Congress, had no power to issue a proclamation freeing the slaves; but as Commander-in-Chief of the Army he had the power, during the war, to issue any military order authorized by the usages of modern warfare, which the circumstances required; but no military order or proclamation issued by him could have effect over persons or property not within the lines of military occupation, but within the lines of the enemy and over which they had exclusive control. Lawrence's Ed. Wheat. Int. Law, 604—Notes.

The proclamation was purely, as it purports to be, a war measure, issued by the President as Commander-in-Chief in time of war, and to affect the war. Under it, slaves coming within the lines of Federal military occupation could not be reclaimed by their former owners. They were thus practically free by means of actual force; by the power of arms. "The rights of owners of slaves, not within the lines of military occupation of the United States during the late war, were in no wise affected

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or impaired by the emancipation proclamation of the President," *Dorris vs. Grace*, 24 Ark., 326.

We have not found many decisions of the courts touching the question, but are inclined to adopt the general doctrine above quoted in disposing of this case.

Mr. Dana, in his edition of *Wheaton's International Law*, (440, 441,) makes the following note. Without adopting all his suggestions, we give them as the views of a prominent member of the legal profession and writer upon elementary law:

"A slave stands in two relations to his master and his master's sovereign: that of an article of property and that of a human being. Regarded as a mere article of property on land, a movable corporeal chattel, he would not be transferred from the private citizen to the occupying power, except as being contraband of war; a test that could be applied only to the males capable of military service or of labor in aid of war. But as persons capable of being used by the will of the master or his State, irrespective of their own will, in war, as soldiers or as laborers, the occupying sovereign has the right to transfer their faculty of service from the enemy to himself.

"They are so directly liable to State control in war, that their condition follows the fortunes of the war. * * *

"If the occupying State hold slaves, the slaves merely change masters; if it does not, the slaves are emancipated. Their emancipation is as complete as their mere transfer would have been. It is a plenary act of ownership exercised upon them by the capturing power in actual possession. The emancipating of slaves by the occupying power may also be treated as an exercise of temporary power of conquest over the political system of the ejected enemy, which, as far as it operates on slaves to give them freedom, is complete, and must be so regarded by all neutrals, and by the conquered State itself after peace, on the principle of *uti possidentis*."

During the civil war of 1861-5, the commanders of the national forces refused to restore slaves that fled to their lines, or

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that came under their control, to masters who were domiciled in places under control of the rebel enemies. This was a war measure, and put on the ground that the slaves were in the nature of contraband of war. By the act of Congress of July 17, 1862, (U. S. Laws, XII., 590), slaves of any persons engaged in the rebellion, coming within the lines of the armies of the United States and all slaves captured from such persons, or deserted by them, and coming under the control of the armies of the Union, and slaves of such persons found in any place occupied by the rebel forces and afterwards by the armies of the Union, were declared to be captives of war, and to be forever free.

By the same act, the President was authorized to employ persons of African descent in the public military service. President Lincoln, by proclamation of 1st January, 1863, designated certain States and part of States as still engaged in rebellion, and then declared the persons held as slaves therein to be henceforth free.

It will be observed that this order of emancipation was not a legislative act of the law-making power of the Union, but an act of the President in his character as Commander-in-Chief, and a military measure. Although the language of the proclamation is general, and in the present tense, as if giving a legal status of freedom from its date to all slaves in the designated States, still, from the nature of the case, it would seem, that being a military measure, by a Commander-in-Chief who had no general legislative authority over regions of country not in his possession, it could not operate further than as a military order. From that time, all slaves coming under the control of the forces of the United States, in the manner recognized by the law of belligerent occupation, were to be free. If this is the correct view of the virtue of the proclamation, it become thereafter a question of fact, as to each slave and each region of country, whether the forces of the Union had such possession as to give effect to the proclamation. In time of peace, the relation of master and slave was matter of local and not of national legis-

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lation; and it could not be maintained that the civil war gave Congress a general legislative power on that subject over regions of country covered by those States and not in possession of the Union forces; or that the President, as Commander-in-Chief, had any legislative functions which could operate by a mere declaration of his will in places out of his belligerent control.

Upon the state of the evidence in this case, the charge of the court was not erroneous, and the judgment must be affirmed.

WESTCOTT, J.

Whether the proclamation was effective for any purpose within the lines of the federal army, is not involved in this case, and while I agree with the judgment of the court, I express no opinion as to whether, with the acts of Congress and under all the circumstances existing at the date of that proclamation, the President had such power under the Constitution of the United States in reference to the property of residents within army lines. It certainly was not effective *outside of the line of military occupation*, and that is the question involved in this case.

ASA JOHNSTON, PLAINTIFF IN ERROR, vs. BENJAMIN D. WRIGHT,
EXECUTOR OF C. P. KNAPP, DECEASED.

1. When the title is in the vendor of personal property, and upon a sale the vendee agrees to stand between the vendor and *all damages between him and the United States Government* which may thereafter occur, and at the time of the sale the authority of the United States is being actually exercised by the army of the United States, in military occupation of the district, the amount of the purchase money paid under a claim of right by the United States to an officer of the army of the United States by the vendor, after protest and imprisonment and notice to the vendee, held to be within the true meaning of the terms "all damages" under the peculiar circumstances of this case.

Writ of Error to Escambia Circuit Court.

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This was an action of assumpsit instituted by the plaintiff in error against the defendant in error.

There was judgment sustaining a demurrer to the declaration, which declaration was in the words and figures following:

The said plaintiff, by his attorney, C. W. Jones, complains against said Benjamin D. Wright, executor of the last will and testament of Chester P. Knapp, deceased, in an action upon promises. For that whereas heretofore, to wit, on the —day of ———A. D. 1862, the said plaintiff agreed to deliver to the persons exercising powers of government in the late Confederate States, that is to say, to the late Confederate States Government, twenty-five bales of cotton when requested and required by the said authorities, and in consideration of certain printed obligations of the denomination of five hundred dollars, issued and put into circulation by the persons exercising the powers of government in the late Confederate States, delivered by them to said plaintiff. And the plaintiff avers that the said printed obligations delivered to him as aforesaid, were what was popularly called Confederate States eight per cent. bonds, and were to become due and payable at the city of Richmond, in the State of Virginia, on the first day of July, A. D. 1868. And the said plaintiff further avers, that the aforesaid twenty-five bales of cotton which he agreed to deliver as aforesaid, were his own rightful property, and was raised and cultivated by him. And the said plaintiff further avers, that *from the time of the agreement above-mentioned in relation to said cotton, up to the time of the sale and delivery thereof to the said Knapp in his lifetime, hereinafter mentioned, the said cotton was never demanded by the said Confederate Government, but remained in the possession of the plaintiff as his property*, until the 16th day of October, A. D. 1865. And the said plaintiff further avers, that on the 16th day of October, 1865, and after the overthrow and dissolution of the government of the said Confederate States by the public forces of the United States, and when the said printed obligations or bonds delivered as aforesaid to the plain-

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were utterly worthless and of no value in the hands of the said plaintiff, by reason of the overthrow of the said government of the Confederate States, the *said plaintiff, considering himself still the rightful owner of the said cotton*, and believing he had a legal right to sell and dispose of the same, at the special instance and request of the said Chester P. Knapp, in his lifetime, to wit, on the — day of — and year aforesaid, did then and there bargain and sell unto the said Knapp all his right and title in and to the said cotton, and delivered the same to him in consideration of the reduced price of twenty-three cents per pound in gold coin, and the execution and delivery by the said Knapp to the plaintiff of a certain instrument of guarantee or indemnity in the words and figures following, to wit:

“Received of Asa Johnston twenty-five bales of cotton, at twenty-three cents per pound, to be weighed at Castleberry’s Station, and a draft given for the same on LeBaron & Son, Mobile, and I agree to stand between the said Asa Johnston and all damages which may hereafter occur between the said Johnston and the United States Government.

“October 16, 1865.

C. P. KNAPP.”

“Mr. Knapp agrees to pay for the cotton above stated in gold. Dated as above.

C. P. KNAPP.”

And the said plaintiff further avers, that at the time of the execution and delivery of the above-stated instrument of writing as set forth, and at the time of the sale of said cotton as aforesaid, the said Chester P. Knapp, in his lifetime, was fully informed as to the subscription of the said cotton to the late Confederate government, and equally apprised and informed as to the nature and character of the plaintiff’s right and title in and to said cotton, and being so informed, then and there, in consideration of the sale and delivery of the said cotton as aforesaid, he, the said Chester P. Knapp, in his lifetime, agreed to stand with the plaintiff as above set forth in the said written agreement, to stand between the plaintiff and all damages which mi

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afterwards occur between the said plaintiff and the government of the United States, meaning thereby that he, the said Chester P. Knapp, in his lifetime, would discharge, pay off and save the plaintiff harmless from the payment of any claims or demands of any kind whatsoever which the said government of the United States might afterwards bring against or compel the said plaintiff to pay by reason of any claim or interest, real or pretended, valid or invalid, on the part of the said government of the United States in and to the said cotton, or any other damages or expenses which might result to or be paid by the said plaintiff in any manner connected with the prosecution of any such claims on the part of the said United States government against the said plaintiff, to the end that the said plaintiff might be secured in the firm possession of, and hold at all events, and without liability to the said United States, the sum of money paid by the said Chester P. Knapp in his lifetime to the said plaintiff for the aforesaid twenty-five bales of cotton, to wit, the sum of three thousand two hundred and eighty dollars in gold coin.

And the plaintiff avers, that on the said sixteenth day of October, 1865, martial law by authority of the President of the United States was in force and operative throughout the State of Alabama, where said agreement was made; that Major-General Charles R. Woods, the Department Commander of the forces of the United States within the said State of Alabama, was invested with full power and authority under and by virtue of the said law martial and the direction of the President of the United States, to enforce all rights and claims or demands, and take cognizance of all controversies wherein such were involved; that afterwards, to wit, on the 24th day of March, 1866, and since the death of the said Chester P. Knapp, the said plaintiff, by order of the said Major-General Charles R. Wood, was taken to the city of Mobile in said State of Alabama as prisoner, and held there for the space of one week by the authority aforesaid, and was then and there compelled by the said authority, under severe penalties, to pay over to the said General Charles R.

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Woods the sum of three thousand two hundred and eighty dollars in gold coin for and on account of the said twenty-five bales of cotton sold as aforesaid to the said Chester P. Knapp in his lifetime. And the plaintiff avers, that before the payment of the said sum of money, and after the said sum of money had been demanded from him by the officers representing the government of the United States, the said defendant was notified by the said plaintiff of such demand, and requested to stand between the said plaintiff and the damages with which he was threatened; but the said defendant, as executor as aforesaid, refused so to do, and said plaintiff was compelled to pay said amount of money or remain a prisoner, which amount he did pay under proper protest.

The declaration then lays damages at five thousand dollars, and ends with the usual conclusion.

The demurrer interposed "assigns for causes the following: First. That the contract set forth in the plaintiff's declaration was null and void because its object and intent was to fraudulently deprive the United States of their property in and to twenty-five bales of cotton in the declaration mentioned.

Second. That the declaration shows no damages incurred by the plaintiff which was intended to be covered by the writ of indemnity of the said testator, as set forth in the plaintiff's declaration.

This demurrer is sustained; there is judgment for the plaintiff and the plaintiff prosecutes a writ of error from this court assigns as error, "That the court erred in sustaining the demurrer filed in this case to the plaintiff's declaration."

Campbell & Perry for the demurrer.

That as presented by the declaration and the so-called Confederate which he was paid in possession

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of its overthrow. After the fall of that government, the plaintiff sold the cotton to defendant's testator for \$3287 in gold, which was paid by testator, who also executed to plaintiff a writing of indemnity whereby he agreed "to stand between the said Johnston and all damages which may hereafter accrue between the said Johnston and the United States Government."

After the fall of the Confederacy the United States claimed the cotton, or rather the money for which it was sold, and which, under a threat of imprisonment, the plaintiff paid over to them.

These facts sustain the following propositions, which are the special grounds assigned in the demurrer:

1. That the contract set forth in the declaration was illegal and void, because it originated in a design to defraud the United States.

2. The declaration shows no damage covered by the indemnity to have been incurred by the plaintiff.

The truth of these propositions depends upon the question whether the United States had an interest in the cotton at the time of its sale by the plaintiff to testator.

The various aspects in which the so-called Confederate States have been viewed by the United States, as their interests or policy might dictate, are matters so connected with the history of the day, so notorious and interesting to all, that courts of justice are bound to recognize and act upon them.

Ever since the fall of the so-called Confederate Government, the United States have treated the States which composed it in some respects as conquered territory. They have recognized that government as having been capable of acquiring property; and have constantly asserted themselves to be the successors of all the proprietary rights of that government. This has been the uniform action within the States where seizure has followed the discovery of Confederate property of every description. The same right is being asserted even in foreign countries, as is shown by the case of Prioleau and others in the High Court of

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ancery in England. This action of the political department of the government is even virtually admitted by the plaintiff's declaration, and the action of that department is conclusive upon all courts within the limits of the United States.

The Supreme Court of the United States, in *Foster & Elam vs. Neilson*, 2 Peters, 253, declared that the action of the political department of the government was binding on the court. The same doctrine has been recently asserted by the same court in the cases of the States of Georgia and Mississippi vs. Secretary Stanton and others.

But there is another aspect of this question, which is equally conclusive, under the laws of nations. Are we a conquered people? If so, the conquerer succeeded to all the rights and property of the conquered government or association. Wheat. Law of Nations, 395-6, 408.

Was the cotton in question the property of the so-called Confederate States at the time of their conquest by the United States? The declaration shows it was sold by the plaintiff to the Confederate States, and paid for in eight per cent. bonds. It is a notorious fact that in all such cases the vendor became and held the cotton as the bailee, and subject to the order of the Confederate Government. But it is alleged that the bonds having become worthless by the overthrow of the Confederate Government, the plaintiff was re-invested with the title to, acquired a lien upon the cotton for the purchase money. upon the fall of the Confederate Government, the title to cotton vested in the United States, it certainly could not return to the plaintiff. No lien existed as between the Confederate Government and the plaintiff. Their contract was completely executed; the possession retained by the plaintiff, been purely that of a bailee without interest and for the modulation of that government. No lien was created by conquest of the Confederate Government. The United States enjoyed the property as the Confederate States enjoyed. It was and still is the settled and declared policy of

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ted States to wipe out forever the force and effect, and even the recollection of Confederate securities. They were made valueless in the hands of the holder as a punishment for the aid and comfort given to the rebellion by the act of receiving them. What, therefore, was intended as a penalty cannot be made to operate as a great benefit to the citizens of the so-called Confederate States, even, as in this case, at the expense of the United States.

But if the right of property was in the United States, it would not avail the defendant, even if he could show that he had a claim upon the cotton for the original purchase money; and that, in any view of the case, must be the full extent of his claim, if any. He bargained for the sale of *the cotton*, and not merely his interest in it; he bargained for and connived at its removal; he was a bailee, and yet, without notice to his principal, he contracted solely for his own advantage, at the expense of the rights and interests of his principal; and lastly, to shield himself from the consequences which he anticipated from his wrong, he takes the writing of indemnity from the testator. In any aspect of the case, therefore, the first proposition of the demurrer is fully sustained, to wit: 1st. That the contract set forth in the declaration was illegal and void, because it originated in a design to defraud the United States. Broom Max., 178; Smith on Contracts, 65.

2d. The declaration shows no damage to have been incurred by the plaintiff which was intended to be covered by the indemnity.

The declaration is framed as though the testator was bound by his agreement to pay twice for the cotton. But the indemnity is susceptible of no such construction. It was intended to cover only such damages as the plaintiff might incur by the sale of the cotton to the testator. It was evidently founded on the hypothesis that the title to the cotton was in the United States. The declaration alleges that the belief of plaintiff that he was the owner of the cotton; but is it fair to construe the testator's obligation entirely by the plaintiff's belief? It is evident the

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testator acted upon the opposite opinion, and the acceptance, of the indemnity, worded as it was, by the plaintiff, establishes his coincidence in that view. Hence, for any damage to the plaintiff incurred upon that hypothesis, the testator agreed to stand between the plaintiff and the United States. If the cotton was not the property of the United States, then no claim could be successfully asserted by them, and no damage could result to the plaintiff by their action. The testator certainly never contracted to indemnify the plaintiff for the lawless violence of any party who, without right, should wrest from him the proceeds of his cotton.

The plaintiff cannot maintain an action on the indemnity without admitting the title of the United States. There was only one contingency upon the occurrence of which a cause of action could arise upon the indemnity, to wit: in the event the United States had exacted more from plaintiff for the cotton than he actually received. But the United States exacted from plaintiff the exact sum, and no more, which he received from the testator for the cotton.

As to plaintiff's imprisonment, the fair deduction from the allegations of the declaration is, that he was imprisoned because of his refusal to pay over the money to the United States.

If the cotton was the property of the United States, the plaintiff incurred no damage. If the cotton was plaintiff's, the indemnity does not cover the damage incurred.

C. W. Jones against the demurrer.

It is contended for the plaintiff that the demurrer should be overruled:

Because it sufficiently appears that the cotton mentioned in the declaration was not in such a state or condition at the time of the sale thereof as made the transaction between Knapp and the plaintiff a fraud upon the rights of any one; 2d. That

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the damages stated in the declaration, as contemplated and embraced by the contract, clearly cover and include the losses sustained by the plaintiff as shown by the pleadings.

We insist in this case that the cotton mentioned in the declaration was the rightful property of the plaintiff at the time of the sale to Knapp. The *obligation to deliver the cotton to the Confederate States* was purely executory on the part of the plaintiff; it was never consummated by a delivery; and even if the right of property had passed by the agreement, the *insolvency and bankruptcy* of the *Confederate States*, before the time *fixed* for the payment of the obligations, and while the property was still in the possession of the seller, *defeated* the *right* of the Confederate States, or any one claiming under them, to the possession of the goods. So far as this question is concerned, the Confederate States had no greater or higher rights under the law, than any corporation or individual would have had in a like case. Suppose the plaintiff had agreed, as stated in the declaration, to deliver this cotton to any corporation in the *State*—the Ala. and Fla. R. R. Co., for example—and had received the *bonds* of such corporation payable in July, 1868, for the same; suppose that in 1865 the said corporation became insolvent and bankrupt; that it was forced into bankruptcy, its franchises and privileges and property sold, and that its bonds in the hands of the seller of the cotton became valueless; and that at the *same time* he had possession of the cotton, which had not been demanded or *delivered*, who would have the right to demand or sue for the cotton in that case? Would the assignee of the bankrupt corporation have such a right? He would not. The *insolvency* and bankruptcy of the corporation, *before* the *bonds* were paid, would defeat the right of the assignee to the property, and the *seller*, in *virtue* of his *original ownership*, which would revive by way of "*post limine*," would have the right to hold the goods.

This was the opinion of the Court of King's Bench in the case of Bloxam et al., vs. Saxby, 4 Barnwell and Cress., 480, in a like

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case. See Tooke vs. Holingsworth, 5 Term Repts., 215; Hanson vs. Meyer, 6 East., 614.

We insist therefore that the right of disposition of this property was in Mr. Johnston at the time of the sale to Knapp, and that where the *right* to sell exists, the exercise of that right cannot by any legal possibility be denied on the ground taken by the demurrer.

The government of the United States has no vested interest or right in this cotton. The most that could be claimed for her in that connection, is, that *she might, possibly*, have proceeded against the cotton by libel, under the confiscation law of 1861, and asked for its condemnation. But this was never done, and *until* the government had so proceeded, and procured a condemnation of the property under the law referred to, *the title* of the plaintiff to the cotton was perfect, for *under* this law of 1861, a *condemnation* is necessary in order to change the title. See the case of the brigantine Mars, 1st Gallison, 192; and the case of the Thomas Gibson, 8 Cranch; and the Supreme Court have held in a recent case, that proceeding under this law must be proceeded in, and determined by, the course of *the common law*. Foundry vs. U. S., 6 Wallace.

But we insist that the property in question was not subject to condemnation under the law of 1861; it was *never* out of the *possession* of the *plaintiff*, until he sold it to Knapp. It was never sold, because *a sale*, to be perfect, implies a delivery, and an *agreement to sell*, as stated in the *declaration*, cannot be made to *amount* to a *sale* by any fair construction. It was not lent or used by the Confederate Government, for *loan and use* imply possession by the party obtaining the one or the other.

Again, the confiscation law of 1861, as its own terms imply was purely a war measure. Its object was to weaken the powers of the resisting forces, by *rendering* insecure the title to property that might be used or lent for the purpose of aiding the rebellion.

After the struggle terminated there was no longer any occa-

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sion for the law, and the amnesty extended by the Executive of the United States to nearly the whole population, after the war, remitted the people to their rights, and prevented the operation of the law. See *Foundry vs. United States*, 6 Wallace.

Parties whose property had been confiscated and sold were refunded the value of the same by the Court of Claims, in many cases, since the termination of the war, and I am not aware of any proceedings against the property of citizens under this law, since the termination of the struggle, that were carried through the regular course; but all such were dismissed by the government, *although* the *seizures* had been made, and the proceedings began, prior to the late peace. I therefore insist that the government of the United States *had* no interest in this cotton, at the time of the sale to Knapp, which made the disposition thereof void upon the grounds stated in the demurrer.

If it is pretended that the United States had any title or claim to this property except what she derived from the law of 1861, upon what are they founded?

She must either rely on the law referred to, or assert title as succeeding to all the rights of the Confederate government. If the latter, then it must be *admitted*, in behalf of the government of the United States, that the contract between Johnston and the Confederate authorities was valid, and that the obligations given to the plaintiff by the said authorities constituted a *good* consideration for the same, and the United States would be thus absurdly, in my opinion, made to say that a *contract entered* into between a *citizen* and the person waging war against the United States, and in the furtherance thereof, is *valid*, and that the bonds issued by the persons in rebellion constituted a good and valuable consideration for the contract.

This view cannot, in my opinion, be sustained. The contract made with the Confederate authorities was void; no rights of property could or did pass by the same, as the Confederate authorities acquired no rights under this contract, for the want of a legal consideration, the United States succeeded to or could

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take no higher or better title or interest than was possessed by the persons to whose *rights she succeeded*.

The Executive and Legislative Departments of the government have held that the late war on the part of the South was a rebellion, and the judiciary will follow such decision. *Rose vs. Himley*, 8 Cranch,; 2 Peters, *Foster et al. vs. Eslam*. Mr. Johnston, at least, had as good a title to this property, as an alien, in case of a direct cast upon him of real estate, which he is not permitted to hold under the law. In such a case he can *hold against* all the world until an inquest of "office found" completes the escheat, and he may convey the estate and all his interest therein. *Sheriff vs. O'Neil*, 1 Mass.; *Storer vs. Batsen*, 8 Mass. 431; *Fox vs. Southback*, 143. Again, if Mr. Johnston had reason to believe that the circumstances constituting his title gave him the legal right to the property, the contract would be valid, although it turned out afterwards that he was mistaken in this respect. *Levy on Contracts*, 603; *Stone vs. Hooker*, 9 Conan, 154; *Allair vs. Ousland*, 2 John. Cases, 52. The defendant is estopped from impeaching his testator's contract on the ground stated. Knapp obtained the possession of the cotton by virtue of the agreement in this case. By *accepting the cotton under* the circumstances, he affirmed the right of the plaintiff to sell, for the declaration states clearly that he purchased it with a full knowledge of all the circumstances connected with the claim and title of Johnston. Had he been in ignorance as to this point, the case might be different; but with a full knowledge of all the facts in the case, he buys the cotton and makes the contract, and after he obtains all the benefit which he could possibly derive from the sale, with the proceeds of the property in his hands, he *then* turns around and *alleges* that *this his own agreement* is founded in fraud and is void. 1 *Greenleaf's Ev.*, 289; 2 *do.*, 352; 1 *Eng. Law and Equity Repts.*, 339. We affirm that the contract in this case does cover and embrace the damages sustained by the plaintiff.

We state in effect that Knapp purchased this cotton with

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all information as to its title and condition; that he obtained it at a low rate, because he assumed *all* the risks of the transaction, stipulating, as he did, to take all the chances of government interference; that the understanding of the parties was that Knapp should meet any demand that the government might make against Mr. Johnston for this cotton, and contest or pay off the same, to the end that Johnston might be secured in the possession of the money paid him by Knapp.

Now this is stated in the declaration, as to the understanding of the parties, as to the words *all damages* mentioned in the agreement, and the plaintiff had a right so to plead it, and the demurrer admits this construction to be true, and the plaintiff on the trial before a jury would have a right to show by parol or other proper proof, the intent of the parties in this respect when the terms of the writing are doubtful. *Haltz vs. Wright*, 16 Lev. and Rawle, 345; 1st Binn., 616; 17 Ala., 45; 20 do., 140. *All damages* mean every kind of damage, and the words must be taken most strongly against the party who stipulates. 1st Burrow, 199; Rives' Ala. Dig., 343.

WESTCOTT, J., delivered the opinion of the court:

The matters of law stated in the demurrer assume that the facts stated in the declaration disclose a case wherein the Confederate government had acquired title to the cotton by a sale from the plaintiff, and that he subsequently simply retained possession as a bailee, the title having passed. The argument upon this assumed case is, that the title having passed out of the plaintiff, the United States by the results of the contest had title, and that the transaction was a fraud. While the case has been argued here by the counsel for the demurrer upon the assumption that the case made in the declaration is one in which the title passed, it has been argued by the representative of the declaration in a contrary view. There may have been what was intended to be under existing local regulations a sale and trans-

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mutation of title by the plaintiff, but the declaration, given a fair construction, does not make that case, and if that case is sought to be made it should be raised by proper pleading.

While it is remarkable that persons would, in consideration of a simple naked contract *to deliver* twenty-five bales of cotton, pay what had at the time a substantial value for all purposes of local trade, with the understanding that the title remained with the party who received the value, yet such is the case stated. The plaintiff avers that the cotton was his property, even according to what was then the accepted law in the locality; avers that there was nothing more than a *contract to deliver*, and that it was neither in intent or effect a sale. If in fact, as alleged in the declaration, this was the property of the plaintiff, and there was no bad faith or misrepresentation, he has suffered a damage which comes within the meaning of the agreement under all the facts of the case as he represents it. If, however, he received in his dealings, with the persons representing the existing local power, what was deemed at the time a compensation and consideration and payment, and a title passed to others, we do not perceive that he has suffered a damage within the meaning of the special agreement; and if title passed and a consideration was paid and accepted, subsequent insolvency of the vendee or worthlessness of the paper accepted by the vendor cannot divest the title or give the vendor in possession as a bailee a lien for the purchase money; but the declaration does not disclose the price. It may or not be true that plaintiff cannot be said to suffer any damage within the meaning of this agreement when he loses that which was not his own, and when his loss is the result of a recovery from him by the party entitled to it, if such was the case here, but we can only pass upon the case made by the declaration. The legitimate effect of this declaration is, that at the time of sale plaintiff represented to Knapp the facts to be as he describes them in the declaration. If he did not, his representations were untrue, and in this view he must fail.

The grounds of demurrer argued in this court are applicable

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to a different state of facts, and if they represent the true state of the case the matter should be raised by other pleadings than a demurrer.

Let the judgment of the court upon the demurrer be reversed, and the case be remanded for further proceedings as the parties may be advised.

CORNELIUS RAIN (IMPLEADED WITH STEPHEN MCCALL AND WILLIAM STRICKLAND,) APPELLANT, vs. JAMES T. THOMAS, APPELLEE.

1. It is the imperative duty of the court to dismiss an appeal upon an application based on the production of the certificate of the clerk of the circuit court that an appeal has been obtained and a bond given, the copy of the proceedings in the court below not being filed, unless the party in default shows some good cause for not having complied with the statute.

2. What is "good cause" for an omission to file a copy of the record of proceedings with the clerk of the Supreme Court, after taking an appeal, is matter to be addressed to the sound discretion and judgment of the court.

3. Neglect to file the proceedings of the circuit court because the appellant or his counsel had reason to believe that no cause would be heard at the commencement of the term, is not "good cause" for the omission, the law requiring the appellant to file the papers with the clerk of the Supreme Court on the first day of the term.

Appeal from Alachua Circuit Court.

This was a motion to dismiss the appeal upon the ground that the appellant had failed to file a copy of the proceedings in the cause with the clerk of this court on or before the first day of the term as required by law. The facts appear in the opinion.

J. B. Dawkins for the motion.

Wilk. Call against the motion.

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RANDALL, C. J., delivered the opinion of the court:

At the last January term the appellee, by his attorney, presented a certificate of the clerk of the circuit court that an appeal had been obtained in this cause, and a bond given upon taking the appeal, and upon this certificate made a motion to dismiss the appeal, the record not having been filed on the first day of the term of this court next succeeding the taking of the appeal. By an indorsement upon the record, it appears that the appeal bond was filed on the 29th November, 1868, and approved by the clerk. The next ensuing term of this court commenced January 12th, 1869, being more than thirty days after taking the appeal.

The statute relating to the subject provides, "it shall be the duty of the party appellant to demand from the clerk a true copy of all the proceedings in such cause in the circuit court, and file said copy with the clerk of the Supreme Court on or before the first day of the next succeeding term thereof," * * * and that "if the party appellant fail to file the proceedings aforesaid, it shall be the duty of the court, unless good cause be shown, to dismiss said appeal on the adverse party producing a certificate from the clerk of the court below that an appeal had been obtained and a bond given as aforesaid."

Under this statute it is the duty of this court to dismiss the appeal, unless cause is shown to the satisfaction of the court for the omission, upon the filing the certificate mentioned, if the copy of the proceedings of the circuit court have not been filed pursuant to law. The statute is so plain in its provisions that it scarcely requires an interpretation beyond a simple repetition of its own language. The court has no discretion to refuse to dismiss an appeal on the production of the certificate of the clerk of the circuit court, when the copy of the record has not been filed as required, except to determine upon the sufficiency of the cause shown; and no discretion whatever if no cause be shown. The law prescribes the mode and time of taking ap

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Peals, and the court cannot enlarge the time or change the mode. It prescribes the manner of bringing appeals before the court, and the court cannot change the methods thereof.

It is considered that the Supreme Court in the case of the Tallahassee Railroad Company vs. Hayward & Walker, 4 Fla., 398, gave a correct construction to this statute and its design and purpose. In that opinion the court intimates, in reference to the manner of showing cause, that statements, "unsupported by affidavit, being objected to by the adverse party, cannot influence the judgment of the court."

Upon the motion being made in the present suit to dismiss the appeal, the court ordered that the appellant show cause why the appeal should not be dismissed, and the attorney of the appellants makes a statement by way of showing cause, "that the clerk of said court failed to prepare the record in time for the first day of the term. That the fault is the clerk's. That appellants complied fully with the law and the rule of court. That appellant's counsel was engaged in the Circuit Court of the United States with the counsel for the appellee at about the time of the commencement of the term of this court, and was not advised that the counsel for the appellee had finished his engagements in that court so as to be present here, but expected some notice from appellee's counsel of the time he would be present at this court. Further, appellant's counsel was informed and believed that there would be no cases heard at that term of this court," &c.

This statement is not sworn to, but it is not objected to, for that reason, by the opposing counsel. If, therefore, the cause thus shown is "good cause," the motion to dismiss will be denied.

It is said that the fault is that of the clerk of the circuit court, and the counsel states at bar that he repeatedly urged the clerk to prepare the record, but that he omitted to do so, and thus caused the delay.

The certificate of the clerk to the transcript of the record

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which is before us is dated January 2d, 1869. This is an official certificate made by the clerk under his oath of office. It shows that the copy was completed ten days before the first day of the ensuing term of this court. There are mails and trains passing over the railroads from the county seat of Alachua county to Tallahassee. Two days at most would be required to transmit the record by the mail to the clerk of this court. The law requires the "party appellant to demand from the clerk a true copy of the proceedings, * * * and file said copy with the clerk of the Supreme Court." The copy having been ready for the appellant ten days before the term of this court, and the duty of the clerk of the circuit court having been fully performed when he had completed and certified such copy, and it being the duty of the appellant to procure and file it here, we do not conceive "that the clerk failed to prepare the record in time for the first day of the term," or that the "fault is the clerk's."

Instead of the record being transmitted to the clerk of this court, the counsel states that it was delivered to him at Jacksonville, where he was engaged in the United States Circuit Court, and was brought to the clerk here by him after the motion had been made to dismiss the appeal.

The counsel had been advised that no causes would be heard at that term of this court, but if such had been the fact, yet the law required that the transcript should be filed on or before the first day of the term, and it was of no consequence, so far as the requirements of the statute were concerned, whether the business of the term should or should not have been postponed.

This, therefore, is not considered good cause why the record was not filed on the first day of the term.

The appeal must be dismissed with costs.

A re-hearing of the motion was denied upon the filing of petition praying a re-hearing thereof by appellant.

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THE PENSACOLA AND GEORGIA RAILROAD COMPANY, APPELLANT, VS. MILES NASH, APPELLEE.

1. Where two juries have concurred in finding a verdict, it ought not to be set aside as against the weight of evidence; otherwise, when it is clearly against evidence.
2. Where the evidence is contradictory, making it the duty of the jury to decide upon the credibility of the witnesses, the court will not set aside a verdict as against the weight of evidence.
3. Where a jury on a second trial find a verdict against the decision of the court on a former motion for a new trial upon a point of law, the court will grant a new trial.
4. If a verdict be found upon testimony which did not tend to prove a material fact necessary to entitle a party to recover, or upon a misapplication of the facts to the charge of the court, a new trial will be ordered, though the same verdict may have been found by two juries upon the same state of facts.
5. Where a slave was injured in the act of performing an improper order, or one not warranted by the contract under which he was hired, the hirer is liable for all the consequences of the injury.
6. But the injury must have been the immediate consequence of the improper employment; or have been received while so improperly employed; or have grown out of the peculiar hazard of the employment; and if an injury occur subsequently on account of the carelessness or heedlessness of the slave, and without the fault of the hirer, the hirer will not be liable for the consequence of the injury.

This is an appeal from the Circuit Court of the Middle Judicial Circuit in Leon county.

The opinion of the court contains a full statement of the facts to which reference is made.

M. D. Papy, for Appellant.

This was an action of Case and Trover by Nash, plaintiff below, vs. The Pensacola and Georgia Railroad Company, for the recovery of the value of a slave alleged to have been killed by the careless act of the defendant and its servants.

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Pleas. Not guilty, and that the injury resulting in the death of the slave was the consequence of the carelessness of the slave and not of defendant.

The facts presented by the record are to be found in the statement thereof presented by the counsel for the appellee.

We maintain for the appellant, that if the order which it is said was improper was of a character not authorized by the terms of the contract of hiring, yet that to enable the plaintiff to recover, the slave must have been injured whilst executing the alleged improper order, and that as such was not the case here, the verdict should have been for the defendant.

It appears by the testimony that the slave was injured, not in the execution of the order, but by his own wilful attempt to get on the engine while in motion, without any order to that effect, and without any necessity, the engine being in the yard where it was to be laid up.

The case of *Kelly and Timanus vs. Wallace*, 6 Flor., 690, shows that it was whilst the slave was engaged in executing the improper or dangerous order that he was lost, which gave the right of recovery.

So, too, in *Forsyth and Simpson vs. Perry*, 5 Flor., 337.

The company are not liable for injuries to persons, &c., through the recklessness and want of common care and prudence of such person; as where a slave lay down on a track and was run over by the cars, it not being able to discover him above twenty feet, &c. *Redfield on Railways*, 384-5, note.

2. We say that the order itself was not improper, because there was no danger in executing it, and was not an order to couple cars, which was what was provided against by the contract of hiring. The testimony of Vinson proves this.

A. J. Peeler, for Appellee.

This case has been pending for more than eight years. It has been thrice argued and submitted to a jury. Once there was a mistrial, and twice a verdict was rendered for the appellee.

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The appellant has had the advantage of *one new trial* in the court below, by which the plaintiff was denied the benefit of his judgment, and delayed in the progress of his case nearly two years, and because a second verdict against it has not been set aside and a *second new trial* granted, it now comes to this court and asks that the *concurring verdicts of two juries* against it upon the facts shall be treated as naught, and the circuit court be required to permit it for the *fourth time* to go before the country.

If this court, adopting its language in the case of Sanderson & Co. vs. Hagan *et al.*, 7 Fla., 318, "*ill very reluctantly interfere with the verdict of a jury as to the facts,*" it will certainly find little in a case so extraordinary as this to invite or justify its interference.

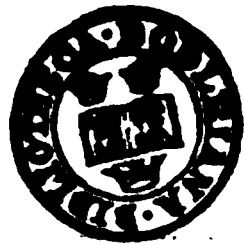
Formerly this court, and its predecessor, the Court of Appeals, refused to invade the province of facts, and the discretion of the judge below. Carter vs. Bennett, 4 Fla., 356.

But under the act of 1853, the refusal of the judge below to grant a new trial may now be assigned as error, &c. Pamp. Laws, 100.

From the reported cases since the passage of this act, the court seems to have discharged their duty under it with great wisdom and caution, owing no doubt to its innovation upon "the practice sanctioned by the most venerable authorities; and to its extremely delicate nature; and to the fact that the slightest mis-step in that direction would result in the utter breaking down of the frame-work of our judicial system," and the conversion of the three justices of the Supreme Court into *three petit jurors*.

"Where there is conflicting evidence, and the verdict is not manifestly against the evidence, the court will not interfere to set aside the verdict of a jury." Talla. R. R. Co. vs. Macon, 8 Fla., 299.

"Nor will a new trial be granted in case of conflicting testimony when the weight of the evidence agrees with the verdict." Hancock, administrator, vs. Tucker, administrator, 8 Fla., 435.



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With reference to the law thus laid down and the facts apparent upon the record, I propose to examine the several errors assigned by the appellant.

The first error assigned is, "That *the verdict of the jury was contrary to the evidence.*"

The record discloses that the slave, Jackson was the property of Miles Nash, plaintiff, in the court below; that said slave was hired by the said Miles Nash to the Pensacola and Georgia Railroad Company; that while in the employment of said company the foot of the said slave, Jackson, was crushed by one of its engines, which at the time of the accident was being moved by its direction and control; that said slave died from the effect of said injury; that his value at the time was between \$1700 and \$1800.

These facts being established, and they were not disputed in the court below, it remains only to inquire under the issues raised by the pleadings,

1st. Whether the death of the slave, Jackson, was occasioned by the carelessness, negligence, or improper conduct of the Pensacola and Georgia Railroad Company?

2d. Whether the slave, Jackson, was killed while in the performance of a duty ordered by the company outside of his regular employment, a duty which he was not required to perform by the contract of hire?

Upon the first issue, the witness, John S. Key, who was the engineer of the company and had charge of the locomotive at the time of the accident, states, in his answer to the fifth direct interrogatory, that the slave, Jackson, "got out to attach a rope to the train and engine, and getting back fell, and the wheels of the engine ran over his foot;" and in his answer to the sixth direct interrogatory, he says that he "ordered him off for this purpose." To the seventh cross interrogatory, which is in these words: "Have you or not frequently known firemen to get on the locomotive when it was in motion, and would you or not consider it dangerous to do so when the car was moving as slow as your's was when Jackson attempted to get up?" he answers,

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“They often get off and on when the cars are moving. *I do not consider it safe at any time when the cars are in motion*” his answer to the third cross interrogatory, he says: “I saw him (Jackson) put his hand on the handle of the car to get up; his hand slipped, and he fell, and I immediately reversed the engine and stopped.” In his answer to the fifth cross interrogatory, he says, “That it was not necessary for Jackson to get back upon the locomotive until it stopped.” Now if this witness, who was the employee of the railroad, and dependent upon it for his situation, and whose interest it was to testify in favor of the railroad so as to relieve himself of all blame in the matter, “did not,” to use his own language, “*consider it safe at any time when the cars are in motion*” to get off and on, why did he order Jackson off, and if it was “not necessary for Jackson to get back upon the locomotive until it stopped,” and it was *not safe for him to do so*, why did he not order him *not to get back*? for he knew that Jackson was required to return to the engine, as a fireman, and that the getting out to attach a rope and the return to his place on the engine was but the execution of one order, and he could easily have prevented accident, for he admits that he “*saw him put his hand on the handle of the car to get up*.” Was there not here something more than “carelessness, negligence, or improper conduct” on the part of the Pensacola and Georgia Railroad Company? Was there not in addition to their *legal* liability, which is clearly established, a *moral* liability for wickedly and cruelly thrusting a poor slave, a faithful and confiding creature, over whose will and action they held complete dominion, into the jaws of a terrible death?

The Supreme Court of this State, in an action of trespass brought to recover the value of a negro slave who was drowned in an attempt to execute an order of the mate of a steamboat, held, “That in all relations and in all matters, except as to crime, a slave is regarded by law as property, and therefore the rule that the principal is not liable to one agent or employee for damages occasioned by the negligence or misconduct of another agent or

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employee, is not applicable to slaves;” and that “the contract of hiring a slave between the owner and the hirer constitutes a bailment of the slave, and the hirer is bound to take ordinary care of him.” *Forsyth and Simpson vs. Perry*, 5 Fla., 337.

The facts of this case were simply, “That the slave was ordered to jump on board the steamer from a flat-boat lying along side. In the attempt to do so, he struck the guards of the steamer, fell into the water, and was drowned.” The court, in commenting upon the character of the bailment, say “that something more than mere good faith on the part of the bailee, is required;” and further, the fact of the slave being a human being, while it does not impair the right of the owner, would rather increase than diminish the liability of the employer; and in conclusion they add: “Apart from the views presented, considerations of public policy, the interest of the master, and humanity to the slave, require that he should be excluded from the exception to the rule, and that he should be excluded from the unrestricted control and oppression of irresponsible subordinates. The liability of the employer (similiter) for the misconduct of his subordinates, will naturally add to the personal security and protection of the slave. Public policy emphatically demands that the owners of boats, railroads, and other public conveyances should employ careful and capable agents in their respective business.”

In the case of *Kelly et al vs. Wallace, Trustee*, 6 Fla., 690, which was also an action on the case to recover the value of a slave lost through the improper conduct of appellant, the court comment on and affirm the doctrine as laid down in *Forsyth vs. Simpson*.

The same question again came before the court in the case of *Tallahassee Railroad Company vs. Macon*, 8 Fla., 299, which was also an action on the case to recover the value of a slave who, it is alleged, died from the neglect and want of care on the part of the appellant, and the court lay down the doctrine, “that the bailee of a slave upon hire is bound to bestow that degree of care and attention which a human master would be-

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stow upon his own servant under the like circumstances.” And all these cases were carried to the Supreme Court by appeal from refusals to grant new trials, and in each of them the judgment of the court below was affirmed with costs. As will be seen by reference to these opinions, they are well fortified by authorities from our sister States, having at the time the same institutions as ourselves.

2d Issue. Was the slave Jackson killed while in the performance of a duty ordered by the company, outside of his regular employment—a duty which he was not required to perform by the contract of hire? It is not denied that the slave Jackson was killed in the employment of the company—the questions are, 1st. Was he killed while in the performance of a duty ordered by the company? 2d. Was this duty outside of his regular employment—a duty which he was not required to perform by the contract of hire?

Upon the 1st question, the witness, John S. Key, who was the engineer, and agent and employee of the company, and had charge of the engine at the time, *admits*, in his answers to the 5th, 6th, and 8th direct interrogations, *that he ordered Jackson off to attach a rope to the train and engine; that “after he had fastened the rope to pull the train down, when the train got far enough, he loosed the rope and said ‘All right, come back,’ and then stepped to the engine and fell, and the wheels passed over his foot.”* This certainly shows that the slave Jackson was in the performance of a duty ordered by the company when he received the injury. The engineer was nearer to him than any one else, and says, in answer to the third cross interrogatory, that he saw him “when he put his hand on the handle of the car to get up.”

The witness, Vinson, also states that “*the boy, Jackson, the fireman and a train hand, then attached a rope from one corner of the car and tender, and drew the train up two cars. The engine, after this was done, started.*” It is contended that Jackson, in getting back on the engine, was not in the performance

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of a duty, &c., and that being injured in getting back, that the company is not liable, &c. Such a flimsy attempt to evade the consequences of the order given by the company will scarcely be countenanced by the court. The getting off the engine, attaching the rope, drawing up the cars, and getting back on the engine, were all necessary duties embraced in the order. Jackson's duty was upon the engine; he was under the control and direction of the engineer; when the engine started it was his place to be there; it was natural that he should seek to get back. The engineer saw him attempting to get back; if it was not his duty to return, why did he not order him *not* to get up? and besides, had he not ordered him off, there would have been no necessity for his return, and the accident would not have occurred. Jackson being a slave, a passive instrument in the hands of the engineer, could not have refused to incur the peril of a return to the engine. 8 Fla., 305, 306.

2d Question. Was the duty being performed by Jackson at the time, a duty outside of his regular employment—a duty which he was not required to perform by the contract of hire? As will be seen by reference to the testimony of John H. Bowman and Miles H. Nash, the contract of hire was made between said Bowman, at that time superintendent of Pensacola and Georgia Railroad and authorized as its agent to employ hands, and Miles H. Nash, representing Miles Nash, the plaintiff. Bowman, in his answer to the sixth direct interrogatory, says: "The agreement was that he should be employed as a fireman, to fire up the engine, to keep it clean, take in wood and water when on the road, and when not employed on the road, to assist in working on the engine in the shop. He was not hired for the purpose of coupling and uncoupling cars, or *drawing up trains to be attached to the engine*. He was not hired for any other purpose than that of a fireman." The same witness, in answer to the seventh direct interrogatory, to wit: "Is the work of drawing up a train or separate cars, and attaching the same to the tender, and getting off or on the car or engine for the pur-

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pose of attaching them together by a rope or otherwise, and cutting them loose, and signalling when to start or stop, the kind of work in which it was agreed the slave Jackson should be employed by defendant?" says: "*It was not the work the slave Jackson was hired to perform, but was entirely foreign to that for which he was employed.*"

This is the testimony of the company's own agent and superintendent, who made the special contracts of hire for it, and it is fully corroborated by the testimony of Miles H. Nash, who entered into the agreement for the plaintiff. It further appears from the testimony of both these witnesses, that there was objection made by the plaintiff, on account of the wish of Jackson, to Jackson's being hired to perform the very duty in the performance of which he lost his life, and that the plaintiff, to accommodate Jackson in the matter, stipulated that he should not be required to perform such duties on account of their danger, &c. Can anything more be required on this point? It is clearly proven that there was a special contract of hire, and that the slave Jackson was ordered by the company to perform a duty outside and in flagrant violation and disregard of its terms, and that while in the performance of such a duty, he received an injury of which he died. Miles Nash was, therefore, entitled to recover his value in trover. 8 Fla., 305, 306. The authorities there cited by the court to support this doctrine are Harrison vs. Buckley, 1 Strobart, 525; Duncan vs. R. R., 2 Richardson, 616; Bell vs. Cummings, 3 Sneed, 275; Lumsford vs. Baylman, 10 Hump., 267; Latimer vs. Alexander, 14 Geo., 259; Mitchell vs. Mims, 8 Texas, 6; Geatman vs. Hurt, 6 Humph., 375; *vide* also Spencer vs. Pilcher, 8 Leigh; Heesley vs. Branch, 1 Humph., 199; 1 Geo., 195; and 11 Iredell, 16, 640.

2d assignment of error. "Because the verdict is contrary to the weight of evidence." I do not propose to discuss this. Instead of being against the weight of evidence, it is fully sustained by the evidence, and is not surprising that *two intelligent juries in Leon county were compelled under their oaths to*

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find a verdict upon it for the plaintiff. But even if “the evidence was conflicting, and the verdict not manifestly against the evidence, the court will not interfere to set aside the verdict of a jury.” 8 Fla., 299, 435.

3d assignment of error. “Because the verdict of the jury was contrary to law.” The law applicable to the case was very clearly given by the court below in instructions asked for by both plaintiff and defendant, and no exceptions were taken to them by either side. There was no room for the jury to have mistaken the law, and it was for them to say whether under the law as they received it from the court, there was evidence to support a finding for the plaintiff, and two juries have so declared. To disregard and set aside their verdict, unless it is very plain that it was without evidence, or that they mistook the law, is to take from them their office as the “legitimate tryers of facts.” The maxim, *ad questionem facti non respondent iudices, ad questionem legis non respondent juratores*, is as wise as it is venerable, and rests upon the frame-work of our judicial system. The legislature of this State has regarded with such sacredness the exclusive right of the jury thus defined, that it has prohibited the courts from charging them as to the facts in any case.

4th assignment of error. “The verdict of the jury was contrary to the instructions of the court.” Before the passage of the act of January 3d, 1848, the judge might in some cases have instructed the jury as to the facts; but being under that act prohibited from charging the jury upon “the facts of the case,” I am at a loss to discover how the finding of a jury upon the facts, upon which they alone were competent to pass, can be contrary to the instructions of the court. If their verdict was contrary to the instructions of the court, it was contrary to law, and was therefore comprehended in the fourth assignment.

Where two juries have concurred in a verdict, it must be a very strong and flagrant case to justify the court in granting a

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new trial. Swinnerton vs. Marquis of Stafford, 3 Taunt., 231; Barrett vs. Rogers, 7 Mass., 297; Frost vs. Brown, 2 Bay., 133; Perry vs. Briggs, 2 Nott & McCord, 184; Bennett vs. Runyon, 4 Dana, 422; Duggan vs. Cole, 2 Tex., 381.

WESTCOTT, J., having been of counsel, did not sit in this case.

RANDALL, C. J., delivered the opinion of the court:

This was an action commenced in Leon Circuit Court in 1860. The declaration contained three counts. The first count alleges that the plaintiff was possessed of a valuable slave named Jackson, of the value of \$2000, and that Jackson was employed on the trains of the railroad of defendant, and that the agents and servants of the defendant so carelessly and improperly drove and managed the train and locomotive of defendant, that through the carelessness, negligence, and improper conduct of defendant, by its servant, the train was run over the slave, and crushed and broke his leg, from which injury he died.

The second count was in trover.

The third count alleges that plaintiff hired to the defendant the slave Jackson to be employed by defendant as a fireman upon a locomotive engine; that defendant disregarding his contract employed said Jackson in and about other business than that mentioned in the contract, and while so employed the slave was run over, crushed and injured through and from the carelessness, negligence, and misconduct of defendant through his servants, by reason of which injuries the slave died, to the plaintiff's damage, &c.

The defendant pleaded not guilty, and further, that the injury from which the slave died resulted from the carelessness of the slave and not of the defendants.

The plaintiff proved by John Bowman that he was in the employment of the railroad company and acted as their agent in the hiring of hands. The slave Jackson was hired by him for

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the company, of Miles Nash, in January, for the balance of the year 1860, for two hundred dollars. The agreement was that he should be employed as a fireman, to fire up the engine, keep it clean, take in wood and water when on the road, to assist in working on the engines in the shop. Was not hired for the purpose of coupling and uncoupling cars, or drawing up trains to be attached to the engine, or for any other purpose than that of a fireman. The work of drawing up a train or separate cars and attaching them to the tender, or getting on and off the engine for the purpose of attaching them together by rope or otherwise, and cutting them loose, and signalling the engineer when to start or stop, was not the work Jackson was hired to perform, but was entirely foreign to that for which he was employed. There was objection made by plaintiff to the slave being employed in any work which would require him to get off and on the engine to couple and uncouple cars, or in any work except that of fireman, on the ground that he considered it dangerous to couple and uncouple cars, and he did not wish to have him changed from one kind of work to another. It was Jackson's duty to attend to the brake on the tender. There was a man employed on the railroad for the purpose of coupling and uncoupling cars at the time Jackson was employed. Was not present when he received the injury of which he died. The duties of a fireman are to attend to the firing up the engine, keeping it clean, taking in wood and water, and attend to the brake on the tender. I assured the plaintiff that Jackson should be employed in no other capacity than that of fireman, and the contract with the plaintiff was subject to such assurances. I was first employed by this railroad in December, 1857, as engineer. Left the employ of the company in February, 1860. There were train hands for the purpose of handling freight, switching cars, and work of that kind. The fireman sometimes assisted, but not as a general thing. I have prohibited them doing such work. I have ordered the fireman to shut the cylinder cocks while the engine was going slowly.

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They frequently shut them on the ground, and got up after the engine started, which I regard as a part of their duty. Plaintiff asked more wages for Jackson, in consequence of the risk he would run as fireman, than he asked for him to work in the country. Jackson was in the employ of the railroad company when I went there in 1857, as a fireman. It was understood between the plaintiff and myself that Jackson was to perform all the duties of a fireman on the Pensacola and Gulf Railroad.

Miles H. Nash, for plaintiff, testified that the boy Jackson died from lockjaw, the effect of the injury received on the road. The foot was amputated by surgeons. The boy had been hired to the road before. He had objected to the manner in which he had been employed, first at one thing, then at another. We hired him as a fireman, and fully discussed the duties of a fireman. The strict duties of a fireman were to be performed. He was not to attend to the coupling and uncoupling of cars, or shifting cars or like work. Was hired to perform the duties of a fireman as understood between Bowman and myself. Was offered the same wages in the country for him to perform duty as a fireman on an engine. Don't think I could have got as much on a plantation.

On the part of the plaintiff, John S. Key testified: The man Jackson was injured in my presence. He got off to attach a rope to the train and engine, and getting back fell, and the wheel ran over his foot. Was ordered off the engine by witness to attach the rope. The train had just come in from St. Marks. After he had fastened the rope to pull the train down, when the train got far enough he loosed the rope and said, "All right, come back," then stepped to the engine and fell, and the wheel passed over his foot. The engine was barely moving and had not made more than three revolutions. The duties of a fireman are to obey the orders of the engineer in firing the engine, getting in wood and water, cleaning up the engine, coupling and uncoupling the engine, attaching cars, and any other work he may be called on to do by the engineer while

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on the road, and when in the shop to do any work he may be called on to do by the master mechanic. I think the injury was his own carelessness, and not the carelessness of the company or its agents, or it may have been accidental. I saw him put his hand on the handle of the car to get up, his hand slipped and he fell, when I immediately reversed the engine and stopped. I have been running for nine years, and have been familiar with the duties of engineers and firemen for eleven years. The distance from where Jackson got off to the point where we had to stop was the length of three cars. It was not necessary for Jackson to get back on the locomotive until it stopped. It is the duty of a fireman to get off the engine at stations and aid in removing cars and obstructions. They frequently get off and on when the cars are moving. I do not consider it safe at any time. It is the duty of the fireman to get off the engine after it starts, to shut the cylinder cock, and get up again when it is in motion. Have never known any fireman to get hurt in getting on the engine before Jackson.

On the part of defendant, James Tuten testified: A higher rate of wages was paid to firemen than to train hands and laborers, because they were employed in more dangerous work. The attaching of a rope from an engine to the train would not be called coupling cars. It is the duty of the fireman or engineer generally to do this. If the fireman is present and directed by the engineer, it is his duty to connect the engine with the cars.

Vinson testified: I was within fifty feet at the time the accident occurred. After the engineer pulled his train up and had stopped the engine, I saw the boy standing looking toward the carpenter's shop. I think he was talking to some one in the shop. When the engineer received word to back his engine, the boy started to get on. When the engine had made a turn or two I heard him "holler." We was on the opposite side from me. The train was on one track, the engine on the other. There was plenty of time, from the time the rope was loosened

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to the time the engine started, to have got on before it started. He was hurt after the engine had stopped and the rope detached. Getting out to attach a rope to the train and engine would not be called "coupling cars."

The testimony being closed, the court charged the jury as requested by the counsel for the respective parties, and no exceptions were taken to the charge. The jury returned a verdict for the plaintiff, and assessed the damages at \$1800.

The defendant moved for a new trial on the grounds stated in the assignment of errors:

This motion was overruled, judgment entered, and defendant appealed.

The errors assigned are:

The court erred in overruling the motion for a new trial, 1st. Because the verdict is contrary to evidence.

2d. Because the verdict is contrary to the weight of evidence.

3d. Because the verdict is contrary to law.

4th. Because it is contrary to the instructions of the court.

There have been three trials of this cause—the first in 1861, resulting in a mistrial, the jury having failed to agree upon a verdict; the second in 1866, resulting in a verdict for the plaintiff, upon which a new trial was granted upon the same grounds upon which a new trial is now urged; and the third trial in March, 1868, in which a verdict and judgment was obtained for plaintiff, and upon the refusal to grant a new trial the case now comes before this court.

It is well suggested that where two juries have concurred in a verdict, it must be a strong case to warrant this court in granting a new trial, and it is said by the appellant that this is such a case. In Swinnerton against Marquis of Stafford, 3 Taunton, 231, the court says: "The jury, who are the competent judges, have again had the case before them, and have decided it. Even if, on nicely scrutinizing all the evidence, we had a doubt whether the verdict was right, it could never be right for

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us to make no weight of two verdicts of a jury, in order to take the chance of a third.” Each of the judges expressed themselves in similar language, and some of them say they would have been better satisfied if the verdict had been the other way. It seems, by the report of the case, as well as by the comments of the judges, that there was conflicting testimony before the jury, and the motion for a third trial was upon the ground that the verdict was against the weight of evidence. The case of *Barrett vs. Rogers*, 7 Mass., 297, cited by the appellee, was one in which the motion was made for a new trial for the misdirection of the judge in matter of law, and it appears that the testimony on the trial was contradictory. The court says: “The ground of the result to which the jury came may not be very intelligible, but as two juries have concurred in it, we think on that account the verdict ought not to be disturbed, and more especially as no objection is made to it as being against evidence.” In *Frost vs. Brown*, 2 Bay., 133, a third trial was moved for, on the grounds that the finding of the jury was contrary to the limitation acts and the *rules* of evidence. The court was divided upon the question. Each party claimed title to lands in question, and the testimony left a doubt as to the locality of the land described in the defendant’s deeds, and also doubt as to the existence of a deed necessary to the plaintiff’s title. The judges who opposed the granting of a new trial, did so upon their view of the law and the quality of the evidence, and add, that they will not disturb the verdict for another reason, viz: “A second trial has already been had, and two special juries have concurred in finding the same facts; I think we have no authority to interfere any further. For although I would never surrender a plain and certain rule of law to the caprice of a jury, or any number of juries, yet where the law is complicated with facts, so that the construction and application of it must depend on the finding of facts, two concurrent verdicts, even against the opinion of the judges, ought to be conclusive.”

Where the evidence is contradictory, making it the duty of a

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jury to decide upon the credibility of the witness, the court will not set aside a verdict as against the weight of evidence, although it seems to preponderate against the finding of the jury. Talla. R. R. Co. vs. Macon, 8 Fla., 299; 2 Wend., 352; 3 Hill, 250; 2 Hill, 576. A new trial will be granted where the verdict was contrary to the evidence. Hart vs. Hosack, 1 Cai. R., 25. And where there is evidence on both sides, if it appear that injustice has been done. Leroy vs. Sternburg, 1 Cai. 162. Where a jury on a second trial find a verdict against the decision of the court on the former motion for a new trial on a point of law, the court will grant a rule for a third trial. Silva vs. Low, 1 John. Cas., 336.

In Sanderson vs. Hagan, 7 Fla., 318, the court say it will very reluctantly interfere with the verdict of a jury as to the facts, yet where it is unsupported by the testimony in the case, or contrary to it, its duty is imperative to set it aside and grant a new trial.

If, in the case at bar, it appears that the verdict was founded upon a consideration of conflicting testimony as to the material facts, we cannot disturb it, even though we might have come to a different conclusion. If it was found upon testimony which did not *tend* to prove a material fact, necessary to entitle the plaintiff to recover, and upon an entire misapplication of the facts, or an entire misapprehension of the charge of the court, such charge being unexceptionable, we must in such case order a new trial, even though the same error may have been committed by two or more juries upon the same state of facts.

The testimony is not conflicting as to any material fact. It shows that the slave Jackson was hired by defendant to labor in the capacity of a fireman on the railroad, and to attend strictly to the duties of a fireman, expressly providing that he should not be employed in the work of coupling and uncoupling of cars, nor to attend to any work like shifting cars, "particularly things of that character," because of the dangers attending that kind of employment; and it was to avoid such danger that the

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condition was made. The man had been for some time previously employed as fireman and about railroad trains upon this road. Upon the arrival of a train at the end of the road, Jackson was ordered by the engineer to attach a rope to the "tender," (the other end of the rope being attached to the train upon a side track by another person,) for the purpose of moving the train a short distance. That being done, Jackson unloosed the rope from the tender, said "all right, come back," and as the locomotive was starting on slowly, he hurriedly undertook to get back on the engine, his hand failed to seize the "handle" securely, and he fell, the wheel passing over and crushing his foot, and this injury occasioned his death.

Edwards on Bailments, 320, says: "The hirer of chattels for use must use ordinary diligence in taking care of them. * * Where the action is against the hirer for an injury alleged to have been sustained through his negligence, the *onus probandi* is upon the bailor to show that the injury occurred through the defendant's neglect. * * The degree of care demanded by the law is measured always by that diligence which, under the circumstances, a man of ordinary prudence and discretion would exercise in reference to the particular thing, were it his own. * * Where the plaintiff sets forth a special contract of hiring, as that a slave hired should not be employed in and about the water, he must not only show an employment of the slave in and about the water, but that in such employment the injury or destruction of the slave took place. He must support his allegations by proof of the facts alleged. (Humph., 199.) Where a slave is hired for a specific purpose, the bailee is responsible for all damages arising from his employment in a different service, and for any loss occurring while the slave is so employed, though by inevitable accident. Evidence that the loss or injury occurred in a service different from that for which he was hired, is sufficient to sustain the action, without showing any want of diligence on the part of the bailee."

In determining the question of the liability of the appellant

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upon the law and the facts, the following inquiries are suggested by the argument and brief of the appellee, viz: "1. Whether the death of the slave Jackson was occasioned by the carelessness, negligence, or improper conduct of the appellant; 2. Whether Jackson was killed while in the performance of a duty ordered by the appellant, outside of his regular employment—a duty which he was not required to perform by the contract of hire."

What evidence had the jury that the conduct of the appellant was careless, negligent, or improper, on account of which the man lost his life?

The circumstances must be considered with reference to the occupation and the nature of the employment in which Jackson was engaged. He was hired by his master to labor in an occupation which is at all times attended with danger, and there was exacted a higher rate of wages on account of this danger. The appellee's witness, Bowman, says that he regards it as part of the duty of a fireman to shut the cylinder cocks while the engine is going slowly, and to get upon the engine after it is started; but that the getting off and on the car or engine for the purpose of attaching them together by rope or otherwise, and cutting them loose, was entirely foreign to the work for which Jackson was employed.

Witness Nash says: "I can't say he was to be confined to the engine; he was hired strictly to perform the duties of a fireman as understood between Bowman and myself—he was not to be sent to couple and uncouple cars."

Now the evidence is that Jackson was ordered to attach the end of a rope to the "tender." If the injury had occurred "in such employment," and on account of the danger attending it, according to the doctrine in *Edwards on Bailments*, and the cases cited by him, which seem quite in point, there would be no question that the jury may have been warranted in finding this verdict. But there is no such evidence whatever. The work had been done and the man was unharmed. After it was done he

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stood a short time looking toward the carpenter's shop; he himself gave the word "back" the engine, and as it started slowly, undertook to get upon the engine, and by not getting a firm hold of the handle his hand slipped and he fell, the engineer not seeing him until he was making the attempt to get on the engine. It then does not seem that there was "carelessness, negligence, or improper conduct" on the part of the appellant which occasioned the injury, but rather an accident which was, so far as the proof goes, entirely owing to the carelessness of Jackson himself. He was not even ordered to get on the engine; it is proved that it was not necessary, for the engine had arrived at the end of the route. The dangers against which the contract provided were not present at the time, and were no more connected with the accident than if a day had intervened. Nor was there any more danger in his getting upon the engine on that occasion than there was in getting on after turning the cocks, a thing which all the witnesses on the subject agree was strictly within the duties of a fireman.

In the case of the Talla. R. R. Co. vs. Macon, 8 Fla., the court say, quoting the views of "intelligent courts:" "The general principle is well established, that where an injury arises from the misconduct of another, the party who is injured has a right to recover from the injuring party for all the consequences of that injury; and that "the wrongful act of the bailee renders him liable for all its *natural* and *immediate consequences*." In Forsyth and Simpson vs. Perry, 5 Fla., 337, a slave was drowned, in attempting to jump on board a steamboat from another boat in obedience to the orders of the mate, the slave being a hand on the steamer, and the jury found that there was "gross negligence." The only important question in that case was, whether the mate or his employer was liable. The court, however, in Kelly vs. Wallace, 6 Fla., 690, commenting upon the case of Forsyth and Simpson vs. Perry, say: "It is difficult to conclude (in the absence of a full statement of the circumstances) that in the mere giving of such an order there was gross negli-

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gence.” And commenting upon other cases, the court says, “they decide that when a boy is hired for a special purpose he undertakes the hazards of the employment; so does an engineer of a steamboat or a hand at a saw. If either of them, without any order or misconduct of his superior, gets entangled in the machinery so as to lose his life, the loss may not fall on the person hiring.”

We thus see that in a case of this character, where the servant is hired to service in an employment in itself more or less dangerous, requiring much care on the part of the servant, and where without the exercise of caution and intelligence by him the danger is constant, and where on account of the peculiar character of the employment, a price is exacted beyond the wages of ordinary labor, the extra risk being taken into account, the loss occurring on account of the carelessness or heedlessness of the servant, and without the fault of the hirer, the hirer is not liable. We conceive that this is such a case; that the slave Jackson was not injured in the act of performing an improper order, or while employed in an act not warranted by the contract of hiring; that if he *had* lately *been* so engaged, the injury did not occur in its performance nor in consequence thereof.

In our judgment, therefore, the verdict of the jury was, contrary to law and to the evidence, and the judgment must be reversed and a new trial awarded.

**THOMAS RANDALL, APPELLANT, vs. WILLIAM R. PETTES,
CASHIER, &c., APPELLEE.**

1. Ordinance No. VIII. of the Convention of 1865 applies to contracts made during the war of 1861-5, and by the terms of the ordinance, courts are “authorized to admit testimony as to the value of the property or consideration contemplated by the parties:” *held*: that the testimony must be confined to the value of the consideration at the time the contract was made.

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2. A bank holds the notes of R., for securing which R. pledged a quantity of cotton which was left in his possession to be disposed of by the bank to meet the notes. R. subsequently sold the cotton and deposited the proceeds in the bank to his own credit in his bank account, and afterwards drew out by his checks all the funds so deposited without applying or directing the bank to apply such deposits to the payment or satisfaction of the notes; *held*: that though there were balances to his credit from time to time sufficient to cover the amount of the notes after they became due, yet, as he neglected to appropriate such balance to the payment of the notes, but drew them out, it is too late to demand the extinguishment of the notes by application of such balances.

3. Deposits in a bank to account of the depositor cannot be considered as *payments* made upon notes owing to the bank, though the bank may hold a sufficient amount of such deposits to meet the indebtedness; but its right to do so is at its option.

The subject of "appropriation of payments" incidentally considered and leading authorities referred to.

Appeal from the Circuit Court of the Middle Circuit sitting for Leon county:

Statement of case by RANDALL, C. J.:

Suit was commenced February 12th, 1867, upon two promissory notes made by appellant, defendant below, to plaintiff, appellee, one for \$350, dated Tallahassee, February 27th, 1862, with interest after maturity at 8 per cent., at nine months, and due November 27th, 1862, and one for \$421, dated Tallahassee, January 18th, 1862, with interest after maturity at 8 per cent, at six months, and due July 18th, 1862.

The defendant pleads,

I. Non assumpsit.

II. *Actionem non*, because after the making of the notes, viz: 29th November, 1862, after the last-mentioned note became due, defendant delivered the plaintiff *the said cotton*, according to the receipts appended to said notes, which plaintiff received in satisfaction and discharge of said notes.

III. For further plea, *actionem non*, because defendant,

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after making said notes and before suit, to wit: December 3d 1863, at Tallahassee, paid the several sums of money mentioned, &c., with interest thereon.

IV. For further plea, *actionem non*, because, on 24th February, 1864, plaintiff was and still is indebted to defendant in the sum of \$800, had and received by plaintiff for use of defendant, and for money due and owing from plaintiff to defendant upon account stated, which said sum exceeds the damages claimed by plaintiff, and out of which money the defendant is ready and willing, and hereby offers to set off and allow to plaintiff the full amount of said damages, &c.

The defendant afterwards, October 1st, 1867, further pleaded that said notes were made in consideration of Confederate money, viz: bills of the Confederate States of America, such being also the consideration contemplated in payment of the money mentioned in said notes, wherefore defendant prays judgment whether the plaintiff ought to recover the amount in the notes mentioned at its *equivalent specie value* or in United States currency at the present time or only the specie value of said notes when said notes were executed.

Afterwards, March 23d, 1868, defendant filed his further plea. That this suit is founded upon a contract or agreement made during the late war between the United States and the late Confederate States, and that the consideration of said promissory notes was treasury notes of the late Confederate States, and that the currency contemplated in payment thereof was Confederate treasury notes; and further, that said Confederate treasury notes became greatly depreciated at the close of 1864, and valueless at the close of the war; and under the provisions of Ordinance No. VIII., of the Constitution (of 1865), defendant prays judgment whether plaintiff's claim under said contract *ought not to be scaled* according to the standard value of said Confederate treasury notes at the close of the year 1863, when he had a large sum (sufficient to cover this claim) on deposit with the bank, on February 24th, 1864, when his dealings

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with said bank closed, as shown by transcript from its books now on file among the papers in this cause.

The plaintiff filed a general replication to the first plea, and to the other pleas specially denies the facts therein alleged. Concludes to the country, and the defendant *similiter*.

The bill of exceptions discloses that there were annexed to the said promissory notes, respectively, the following instruments in writing:

“Received January 18th, 1862, from the State Bank of Florida, forty bales of cotton marked T. R., Nos. 1 to 40, inclusive, subject to the order of said State Bank of Florida, and to be held by me under cover and carefully protected, which forty bales of cotton are to be disposed of by said State Bank of Florida to meet my note held by them due July 18th, 1862.

“THOMAS RANDALL.”

“Received and held by me subject to the orders of W. R. Pettes, cashier, twenty bales cotton marked T. R., Nos. 41 to 60, inclusive, at my plantation in Jefferson county, Florida, which cotton is to be delivered to said W. R. Pettes, cashier, or order, whenever called for, to be sold at such time and point as he may select, and from the proceeds of said cotton, when sold, my note of this date for \$350 and interest, together with all charges which may accrue on said cotton, is to be deducted, and the balance remaining, if any, is to be accounted for to me by said W. R. Pettes, cashier. The cotton is held at my risk.

“THOMAS RANDALL.”

“TALLAHASSEE, February 27th, 1862.

Which, together with said promissory notes, were offered in evidence by plaintiff.

The plaintiff also offered in evidence the testimony of Philip T. Pearce, that in January and February, 1862, he was offered a large sum in gold at 10 per cent., and that in the latter part of February, 1862, a considerable sum in gold was sold in

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Jefferson county at 15 per cent., and that the price of gold did not exceed those sums in Leon county, during January and February, 1862.

Arvah Hopkins also testified that the State Bank of Florida refused to place the terms "Confederate funds" in the face of their notes taken for loans, and that there was but very little difference between the value of Confederate notes and gold in January and February, 1862. The deposition of W. R. Pettes was offered, who testified that he was cashier of the State Bank, and defendant borrowed money from said bank at the date of said notes, and gave these notes therefor. Cotton was pledged by defendant as security. Defendant never delivered the cotton to me or to any other person, so far as he knew, in discharge of said notes. Defendant never paid said notes or any part thereof, to witness's knowledge. Defendant never tendered any payment thereof. That witness purchased cotton of defendant, but the bank had no concern in the purchase; purchased it for F. A. Luling; paid the purchase money to defendant; there never was a request or suggestion made by defendant that I should retain any part of the purchase money, and apply the same to the payment of said notes. In November, 1866, I stated to defendant that no part of the purchase money of the cotton had been applied to the payment of the notes or either of them, that no cotton had been delivered by defendant to me as cashier or otherwise, to pay said notes. I reminded him that on the occasion of each purchase I had paid him all the purchase money for the cotton. Offered to show him by the books and papers of the bank, the truth of these facts. Think defendant called and inspected the books and papers, and he expressed surprise that the notes remained unpaid, but made no objection to the correctness of the accounts. The notes are wholly unpaid.

On cross-examination witness testified: That defendant never sold or delivered to him as cashier, any of the cotton pledged as aforesaid; the cotton purchased for Luling was not under

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to the bank, and there was no understanding that the
s should be applied to the extinguishment of this claim.
dant received all the proceeds. (Witness examines the
cript of bank books.) The balances accruing in defend-
favor were not applied to payment of the notes because
ndant never ordered any such disposition of his funds;
er checked for that purpose. The bank and bank officers
ld not make such application of their own motion.
No cotton pledged to the bank was ever purchased by witness
n any capacity, or by any other person that witness knows of.
Believes when he paid for the cotton purchased on account of
Luling, defendant deposited the purchase moneys paid him to
his individual credit in bank. Witness was cashier; ceased to
cast as such in 1865.

Defendant was sworn as a witness, and testified that the notes
were given for Confederate money and in connection with a
Confederate money transaction. The fact of the notes being in
existence escaped his mind. Had large deposits in the bank from
1862, during several years, to and including 1864, and during
that time there were balances in his favor of Confederate notes
in the bank. The cotton pledged to the bank was sold by wit-
ness and the proceeds deposited. Could not say that he had paid
of the notes, or had ever directed their payment, or appropriation
of the deposits to their payment, by the bank, and the moneys
mentioned as on deposit during 1862, 1863, and 1864, were all
drawn out by him from time to time upon his checks. After the
close of the war he called on B. C. Lewis, agent of the bank,
who furnished him with a statement of his bank account, (found
in Mr. Pettes' testimony.) [The statement referred to is an ac-
count of deposits in bank and checks against them, extending
from May 28, 1862, to March 4, 1864. At the maturity of the
first note there appears a balance in defendant's favor of \$945.40;
at maturity of second note, \$443; on December 31, 1863, \$2,947;
and March 4, 1864, defendant had checked out this balance and
paid to the amount of \$428, which he paid to the bank on

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Defendant then offered as a witness Arvah Hopkins, who was sworn. Whereupon defendant's counsel, asserting his prior right of appropriation of a sufficient amount of the Confederate notes for the payment of the notes in suit, out of a balance claimed to be due to him on his deposit account with the bank on December 31, 1863, offered to prove the specie value of Confederate treasury notes March 4, 1864, for the purpose of scaling any balance which the jury might find in defendant's favor at that time, and asked the following question: What was the value of Confederate treasury notes on the 31st day of December, A. D. 1862; 31st December, 1863, and March 4, 1864? To which question plaintiff, by his counsel, objected, on the ground that no direction to appropriate any balance at any time in favor of the defendant being proven, and no payment being directed, but on the contrary it having been admitted that all the deposits had been subsequently drawn out, and no appropriation to or payment of the notes in suit had been directed, the question was irrelevant, there being nothing to which the value, if ascertained, could be applied, and it being first necessary to prove a payment or appropriation before evidence of its value was admissible, and because evidence of value is confined by the ordinance to the date the contract bears.

The court sustained the objection, and refused to admit evidence to that effect, exclusively restricting evidence of such character to proof of the specie value of such currency to the *date* of each note, and refusing to admit proof of the specie value of Confederate currency at any subsequent time.

To which ruling the defendant excepted.

A verdict was rendered for \$945.19 in favor of plaintiff, judgment entered, and the defendant appealed.

The appellant assigns the following errors:

I. In the entire action of the court in not conforming to the intent and spirit of the VIIIth Ordinance of the Constitution of 1865, which authorizes adjudication upon principles of *equity* in cases of this character.

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II. In ruling against the equity of the case, which consists in scaling the amount of the debt according to the specie standard of the value of the currency in which its payment was contemplated by the parties; and the scaling process is applicable *only when the debt becomes due*. The ordinance does not prescribe the *time* of scaling, and the ruling of the court in determining the date of the contract as the proper time, is an error of judicial interpretation, and inconsistent with the import and spirit of the ordinance.

III. In refusing to admit evidence offered to prove the specie value of Confederate currency December 31, 1863, under the second plea under the ordinance, the plaintiff in error having been entitled by his prior right of appropriation to extinguish the debt out of the balance in his favor on the books of the bank at that time; and the defendant in error not being entitled to recover more than the specie value of Confederate currency for the amount of the principal and interest of the notes in suit, which balances he subsequently *allowed the plaintiff in error to draw out*.

IV. In refusing evidence offered to prove the value of Confederate currency March 4, 1864, when the dealings between the parties closed, because the compulsory exaction of payment in sound funds, for a debt contracted in Confederate currency, and contemplated as payable in it, is manifestly against equity and good conscience, and the very wrong against which the ordinance, in the spirit of equity, intended to guard and provide. The question, therefore, was not irrelevant.

V. The essence of the defense being the debtor's prior right of appropriation of his *deposits* in bank to the *payment* of the debt he was owing it, the court erred in refusing evidence tending to show the motive of defendant in error in not making the appropriation of the large balance existing in plaintiff's favor December 31, 1863, sufficient to extinguish the debt, and in holding it in reserve for future checks, *until it was all drawn out*, without notifying plaintiff in error of the non-payment of

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these notes, or demanding payment of the same, the motive being the extremely low scale of depreciation of Confederate currency at that time.

A. L. Woodward, for Appellant.

1. If there be error in the record the court will correct it, though not pointed out in the assignment of errors. *Marringvale vs. Jones*, 3 Har., 36.

2. Cases may be determined in the Supreme Court on grounds which were not taken nor even suggested in the court below. *Gautier vs. Franklin*, 1 Texas, 732, and authorities there cited.

3. But though this court will re-examine questions decided against respondent, as well as such passed *sub silentio*, or consider points made here for the first time, if raised by the pleadings and proofs, yet care must be taken that neither party be permitted to mislead his adversary, or to make objections which, if made in the court below, might have been obviated. *South. Life Ins. T. Co. vs. Cole*, 4 Fla., 359.

4. While the court recognizes the doctrine that upon a writ of error it is its province to look beyond the bill of exceptions, and consider errors apparent upon the face of the record, yet this rule must be limited to such errors only as have not been waived by the record. *Union Bank vs. Call*, 5 Fla., 406.

5. The Supreme Court has power to allow amendments to assignment of errors, and will exercise the power when justice requires it, but the application must be reasonably made. *Parsons vs. Copeland*, 5 Mich., 144.

BAILMENT.

1. The contract of appellant for a loan of Confederate currency being based upon a bailment or pledge of sixty bales of cotton to secure its payment, the two contracts ought to be considered in their mutual dependence and connection; the appellee, while vested with the rights, assuming the duties of bailee.

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1. Ordinary care of the property.
2. Its sale upon maturity of the debt, the application of the proceeds to payment, and restitution of the balance to the owner.

Nor are these rights impaired, or duties remitted, or liabilities discharged by a re-transfer of the property for a temporary or special purpose.

If, therefore, the performance by the debtor were hindered, prevented, or delayed by the creditor, the liability of the former will be correspondingly modified.

3. By the failure and omission of appellee to apply appellant deposits to the payment of his notes at maturity, he is entitled to recover only their *specie value* as they become due.

4. A bank failing to demand payment of a bill received for collection, makes the bill its own, and becomes liable to the owner for the amount. Bank of Washington vs. Triplett, Peters, 25.

5. If a dealer with a bank has a balance to his credit on general cash account with the bank, and dies indebted to the bank on a judgment, and also on a simple contract, the balance may, independently of the statute of set-off, apply such balance to the simple contract. State Bank vs. Armstrong, 4 Dev., 57.

In Delaware a bank is bound to apply deposits of a maker to the payment of his note. McDowell vs. Bank, 1 Hare, 369.

6. The proceeds of a pledge for a particular advance are to be applied to the payment of that advance. Mazziore vs. Proc...

8 Cal., 522. It is a settled rule that the source or fund from which a payment is made will direct its application. Hicks Bingham, 11 Mass., 300.

7. Finally: appellee having neglected to apply appellant deposits to the payment of his notes, Dec. 31, 1863, it is fully submitted whether appellee is entitled to recover more than the *specie value* of their amount at that time.

AUTHORITIES.

n. 577-8; Chitty on Contracts, 5

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Edwards on Bailment, pp. 188, 89; 211, 233-34, 250, last paragraph.

VIII. ORDINANCE, CONSTITUTION 1865.

1. The ordinance having originated in a spirit of equity, it is entitled to a corresponding interpretation to afford the protection it was designed to secure.

2. Equity treats as done that which ought to be done, at least for those who have a right to pray it ought to be done. Willard's Equity Jurisprudence, 47.

3. Mutuality is of the essence of every contract; it must be fair in all its parts, and equal in its terms; and whether it be originally wanting in these elements, or subsequently becomes so by the acts or conducts of the parties, a court of equity will modify it according to the circumstances of the case and the merits of the parties. Willard's Equity Jurisprudence, pp. 291-92, 94; *vide* 267-71, 72, 74.

4. In the case of an executory agreement, the time appointed for its performance may not be of its essence, yet may become material by circumstances or by the conduct of the parties, and if so made material, the party in default cannot demand specific execution of the other. Jackson vs. Luggon, 3 Leigh, 161.

5. A person asking specific execution of a contract, must either show himself without default, or must exhibit some excuse for such default. Campbell vs. Harrison, 3 Litt., 292; Moore vs. Skidmore, Litt. Sel. Cases, 494.

6. Gross negligence for an unreasonable time to do that which it was incumbent upon a party to do, is equivalent to fraud, and justifies a dissolution of the contract. Bullock vs. Beones, 3 A. K. Mar., 494.

7. The maturity of a promissory note for a loan of Confederate currency, and payable in it, is the proper time for scaling *its specie value*:

1. Because it is not demandable before.

2. Because the payee is bound to receive payment in such currency at that time, and,

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3. Because the lender incurs the risk of depreciation.

AUTHORITIES.

Smith's Constitutional Construction, pp. 631-36; Blackstone, 658-92; 814, 819-21-26; ———— on Statutes, sections 547, 675, 703, 709; 1 Wash. Va. Cases, 194; 2 Wash. Va. Cases, 94 to 104; 1 Mumf., 460; Day vs. Murdoch, 1 Mumford, 460; 26 Ordinance Constitution Ala., 1865.

APPROPRIATION OF PAYMENT.

1. The rules established by the English and American authorities to regulate the appropriation of payments between different debts, are,

1. The debtor has the absolute right of appropriation.

2. Upon the debtor's omission to exercise the right, it reverts to the creditor.

3. If neither party exercises the right, the payment remaining indefinite, the court being applied to, declares the law in accordance with the principles of equity and justice.

2. The omission of the debtor to exercise his right has merely the effect of transferring it to the creditor *sub modo*, to be exercised for their mutual benefit, and not in a manner partial or exclusive.

3. The debtor's right of appropriation is never lost, unless by *express relinquishment*; *his unequivocal consent must be shown*.

4. A general payment will be referred to a debt due in preference to one not due; a *payment* rather than a *deposit* is to be presumed.

5. In the absence of evidence showing unmistakably by the intention of the parties, a general payment to a commission merchant with whom a debtor has a running account, will be referred to his existing indebtedness, and not to future advances. 27 Ala.

6. There are some considerations which, without express declarations, control a creditor's right of appropriation, either

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as affording a legal presumption of the debtor's intention, or, as being of paramount obligation of reason and justice.

7. It is a paramount rule, whenever the appropriation of a general and indefinite payment devolves upon the court, that the intention of the parties before and at the time, so far as it can be inferred, shall prevail; and when no particular inference can be made, the court will be guided by a presumed intention founded on reason, probability, and justice.

8. It is, therefore, respectfully submitted, whether in this case, where appellee was debtor of appellant to the extent of *the balances in his favor on deposit*, the appellee was not bound in *good faith* to apply such balances to the payment of appellant's debt.

AUTHORITIES

1 Pothier on Obligations, 328-31, 32, 33, 35; 1 Story's Equity Jurisprudence, sec. 459 a, 459 b, 459 e; Hilliard's Equity Jurisprudence, 98 to 100.

REPORTS.

1 Am. Lead. Cases, 276-77, 78, and 281, 283-88 and 94; Clayton's Case, 1 Merrivale, 607-8; Sandiford vs. Taylor, 7 Wheat., 13, 20; Opinion of Marshal, J., 5 Peters, 209, 13; Baker vs. Stackpole, 9 Cowen, 420-35; Patterson vs. Hull, 9 Cowen, 747, 65, 66 to 78; Ayer vs. Hawkins, 19 Verm't, 28 and 30; Milliken vs. Tufts, 31 Maine, 499, 500; Poindexter vs. Laroche, 7 S. & M., 713; Barnes vs. Williams, 10 S. & M., 118; Miller vs. Leflore, 32 Miss., (2 George,) 644, *vide* agreement of counsel, 640, 41; Harrison, vs. Johnson, 27 Ala.; Baber Hens vs. Shekney, 36 Ala., 495.

A person owing money under distinct contracts has undoubtedly a right to apply his payment to whichever debt he may choose, and although prudence suggest an express direction of his payment at the time of their being made, yet there may be cases in which this power would be completely exercised at the time. A direction may be evidenced by circumstances as well as by words. A payment may be attended with circumstances

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which demonstrate its application as plainly as words could demonstrate it. The inquiry, then, in this case, is, whether the payments made by appellant to the appellee were accompanied with circumstances which amount to an exercise of the power to apply them. *Taylor vs. Sanford*, 7 Wheat., 13, 20; *vide* 5 Peters Con. Rep., p. 209, 13. Circumstances having indicated the appropriation designed by the payer, the creditor shall not apply it otherwise. *Scott vs. Fisher*, 4 Monro, 387. It is not necessary that the debtor should formally declare his election at the moment of making payment; it is held to be sufficient to restrain the creditor, if there is anything clearly indicating the intention of the debtor, or tending to cause a fair presumption as to what it would be. *Carpenter vs. Gora*, 19 New Hampshire, 487.

DEPOSITOR AND DEPOSITARY.

1. By the modern decisions the contracts of corporations rest upon the same basis as those of natural persons, and are governed by the same rules. *Flecker vs. Bank of U. S.*, 8 Whea., 338.

2. The appellant was entitled, without *express* directions, to have his deposits in bank applied to the payment of his notes held by it, at maturity.

3. A bank being the debtor of its depositor to the extent of his undrawn deposits, and having the right of applying balances in his favor to the payment of a debt which it holds against him, it is respectfully submitted whether appellee was not bound to make such appropriation, and being in default therein, whether any more be recoverable than the *specie value of the debt when due*.

4. Where money paid into a bank is passed generally to the credit of the owner, and not received as a *special deposit*, the money may be applied by the bank to the payment of any demand they may have against the depositor, and if the money is lost without the default of the bank, the depositor is entitled to payment. *Commercial Bank vs. Hughes*, 17 Wendell, 94.

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5. If a bank has no deposit funds of a principal debtor which it may legally apply to the discharge of any indebtedness to it, and does not so apply it, the sureties are discharged to the extent of the funds. Dawson vs. Real Est. Bank, 5 Pike, 283.

6. It is therefore submitted, whether the default of the appellee can in common justice be visited in its consequences upon the appellant, who has committed no breach of contract, and done no wrong, or whether appellee shall profit by his default in allowing appellant to draw upon his depositors after the *maturity of his notes*, without notifying him of non-payment until his deposits had been entirely absorbed; and appellant submits the appropriateness of the maxim to the appellee: "He who is silent when he ought to speak, shall not be heard when he does."

AUTHORITIES.

19 New York Rep., 499; 34 Barb., 238. A deposit of depreciated bank notes in bank is sufficient to entitle the drawer of a check to due diligence on the part of the holder in presenting the same. 8 Miss., 382.

M. D. Papy, for Appellee.

WESTCOTT, J., being of counsel in the court below, did not sit in this case.

RANDALL, C. J., delivered the opinion of the Court:

The errors assigned are properly reducible to two points, viz.:

1st. The proper construction of Ordinance No. VIII. of the convention of 1865; and 2d. The debtor's right of appropriation of funds deposited by him in the bank, and to make the appropriation after the debt became due, and even after the funds so deposited had been entirely drawn out by him.

The ordinance referred to was adopted by a convention of delegates elected by the people soon after the close of the late war, while the country was in a peculiar condition on account of the war and its results.

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It is unnecessary to consider, in determining this case, the general question as to the force and effect of an ordinance of that convention, not incorporated into or referred to in the constitution framed by the convention. Nor is any question raised as to the legality of the consideration of the notes in suit.

I. The appellant claims that the court did not conform to the spirit of the ordinance, and insists that the “scaling process” is applicable, not at the date of the contract, but at the time when the cause of action occurred, and even later.

The ordinance applies to all “contracts made and entered into during the late war, * * and the courts are thereby authorized to admit testimony as to the value of the property or consideration contemplated by the parties to said contracts, and to instruct the jury to find accordingly; *provided*, that the defendant shall allege by plea under oath, and prove to the satisfaction of the jury, that the currency contemplated in payment of said contract was Confederate or State Treasury notes, or upon what basis the consideration or the value of the property or its use, which was estimated at the time of the formation of said contract.”

This ordinance contemplated the accomplishment of two principal ends: the recognition of the currency, or the thing which supplied the place of currency during the war, and which really formed the standard of nominal values in the transaction of business during the war, not necessarily as a thing of real value, but as a medium of commercial transactions; and to provide the mode of ascertaining the actual money value of the consideration of the contract, whether such consideration were Confederate or State notes or any thing else. It was a measure of relief extended to those who at the close of the war were found indebted upon contracts founded upon fluctuating and uncertain values. It was not intended to relieve from any and all liability to perform such contracts.

Even if the language of the ordinance in this respect were more obscure than this is claimed to be, the evident intention of

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its framers, founded in a spirit of equity and as a “peace measure,” was that no debtor should be holden to pay or return more than he actually received; and on the other hand that the creditor should sustain no loss. The language used is, “the value of consideration contemplated,” &c; and when it should be pleaded that the currency contemplated in payment was Confederate notes, &c., then the courts are authorized to admit the testimony and to instruct the jury to find accordingly, to wit: according to the value of the property or the *consideration contemplated*.

The testimony of the defendant is that the notes “were given for Confederate money and in connection with a Confederate money transaction.” Other than this there is no evidence that shows upon what basis the consideration was estimated; that any “estimate” was made; or that the “currency contemplated in payment” was one thing or another.

The currency in use at the time of the making of these notes was worth eighty-five to ninety cents upon the dollar in gold. The defendant then received what was nearly equal in value to gold, and could have exchanged it for gold. When the notes became due these Treasury notes were greatly depreciated, and by estimating the value of his promissory notes by their nominal value in Confederate currency, if he had paid his notes therewith he would have made a handsome margin, and the lender would have encountered a serious loss.

We do not believe the framers of the ordinance intended that the debtor should satisfy the debt contracted by him by paying a smaller amount of money or of value than he received; or that the loss by depreciation should fall upon any other than the holder of currency, according to the ordinary rule. If they had so intended they would doubtless have said so in plain words; and in that case, the appellee here would doubtless have attacked the ordinance in another direction, and other questions would have been raised in this cause.

II. The appellant, asserting his prior right of appropriation of

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ent amount of the Confederate notes, in the payment of
tes in suit, out of a balance claimed to be due to him on
posit account with the bank on December 31, 1863, offered
rove the specie value of Confederate Treasury notes
ch 4, 1864; for the purpose of scaling any balance which the
might find in his favor at that time, inquired to that end,
the appellee's counsel objected thereto. The objection was
ade upon the grounds that no direction had been given by de-
endant to make the appropriation; no payment had been di-
ected; all the deposits had been drawn out by the defendant;
the question was irrelevant, there being nothing to which the
value if shown could be applied. The court sustained the ob-
jection, and restricted the evidence to proof of the specie value
of Confederate notes at the date of each note, and refusing to
admit proof of such value at any subsequent time. This pre-
sents the second general ground of exception.

It is a well-settled general rule that if one owes two or more
separate debts and pays money to his creditor, the debtor has a
right to apply the payment to which of the debts he pleases,
provided he elects at the time of payment the purpose for which
it is made. If he does not so designate, the payee may elect
how it shall be applied. It has been held in some cases that the
creditor may appropriate at a future day, even at the time of
bringing his action, and is not compelled to make the appropri-
ation immediately, like the debtor. The rule of the civil law is
that where no application is made by either party at the time,
the law will make the application upon the presumed intention
of the debtor. There has been much confusion on the subject in
England. Equitable principles have frequently controlled, and
the courts have made the application in such manner as to se-
cure either party from the greater hardship or sacrifice. See
Pattison vs. Hull, 9 Cowen, 747, reviewing and collating the
decisions of the English and American courts. 19 Vt. R., 26;
Stone vs. Seymour, 15 Wend., 19.
A person owing money under distinct contracts, has undoubt-

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edly a right to apply his payments to whichever debt he may choose, and although prudence might suggest an express direction of the application of his payments at the time of their being made, yet there may be cases in which this power would be completely exercised without any express directions given at the time. A direction may be evidenced by circumstances as well as by words. A payment may be attended by circumstances which demonstrate its application as completely as words could demonstrate it. A positive refusal to pay one debt, and an acknowledgement of another, with a delivery of the sum due upon it, would be such a circumstance. The inquiry then will be whether the payments were accompanied with circumstances which amount to an *exercise* of his *power* to apply them. *Taylor vs. Sandiford*, 7 Wheat., 13. Ch. Justice Marshall says, in the *Mayor, &c., vs. Patten*, 4 Cranch, 317, "It is a clear principle of law, that a person owing money on two several accounts, as upon bond and simple contract, may elect to apply his payments to which amount he pleases; but if he fails to make the application, the election passes from him to the creditor."

It is equitable to apply payments first to extinguish those debts for which the security is most precarious. 7 Cranch, 572; 6 Cr., 8.

It is too late for either party to claim a right to make an appropriation after the controversy has arisen, *an a fortiori*, at the time of trial. 9 Wheat., 720; 1 Mason, 328.

If the debtor waive his right to direct the application of a payment, a court of equity will not disturb it. 10 S. & M., 113.

The rules applicable to the subject of the appropriation of *payments* were so fully and ably discussed that we have deemed it fit and proper to examine the authorities to some extent.

"The appellant submits whether in this case, where the appellee was the debtor of the appellant *to the extent of the balances in his favor on deposit*, the appellee was not *bound in good faith* to apply such balances to the payment of the notes." He cites several cases showing the creditor's *right* to apply de-

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posits, or to retain them against the depositor's indebtedness on other accounts and insists that because he had a right to do so, it was equally his *duty* in a case like the present.

The doctrine of "appropriation of payments" will scarcely apply to the present case. Here were no *payments* made upon these notes; no directions to apply any of the moneys on deposit standing to his credit toward the extinguishment of the notes; the cotton pledged to secure these notes remained in his possession and was sold by him, and the bank was not notified that the moneys deposited by him and passed to his credit in his deposit account were the proceeds of the sale of the cotton pledged; and he draws his checks from day to day against his deposits until his funds are all drawn out; and on the 4th of March, 1864, had overdrawn to the amount of over \$400, which **he made good on that day**, leaving the notes now in suit still **unpaid**. He expressed surprise when the notes were produced, and said he supposed them to be paid, and had forgotten them. This is doubtless true, and yet the bank had no intimation that he had desired them to be cancelled by an appropriation of his deposited funds, without express orders to that end, and without his check for the amount upon his deposits. He had *exercised* his right of appropriation of his funds by withdrawing and using them for other purposes, and having done so, it is too late to make the appropriation now that the funds are gone, pursuant to his express directions, beyond the reach of the bank, and have been sued by the appellant himself.

It was urged in the argument that by the pledge of sixty bales of cotton by the appellant to the appellee, the latter became the bailee of said cotton, and that it was his duty, therefore, on the sale of the cotton, to apply the proceeds to the extinguishment of the notes.

It is difficult to perceive, however, in view of the fact that the bailor retained the possession of the cotton, and thereby became the bailee of his bailee, and afterwards sold it and appropriated the proceeds to his own use, how he expects to avail

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himself of these circumstances to be relieved. Had the bank disposed of the cotton, it would have been liable to account to the party therefor, and to apply the proceeds to the payment of the notes. But the pledgor disposes of the pledged property, converts the proceeds to his own use, the existence of the notes passes from his memory, and now he demands the extinguishment of the indebtedness because the bank did not arbitrarily make the application of his deposit funds, but allowed him to make such application of them as he saw fit.

The judgment of the circuit court must be affirmed.

SARAH A. FRISBEE AND JAMES JOHNSON, ADMINISTRATORS OF
JAMES T. FRISBEE, PLAINTIFF IN ERROR, VS. HENRY TIMANUS,
DEFENDANT IN ERROR.

1. A paper purporting to be a writ of *certiorari*, without the seal of the court from which it purports to be issued, and without being tested according to law, is a nullity.

2. In the absence of a bill of exceptions showing the testimony given on the trial in the circuit court, this court will presume that there was adequate evidence before the jury to support the verdict.

3. A judgment will not be reversed unless an error appears to have been committed by the court below, and the error must clearly appear in the record.

Writ or error to the circuit court sitting for Nassau county.

The case is stated in the opinion of the court.

Bolling Baker and *R. M. Smith* for Plaintiff in error.

J. P. Sanderson for Defendant in error.

This was an action of ejectment brought in the circuit court for Nassau county for the recovery of certain lots of land sit-

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uated in the city of Fernandina. These lots have been sold by the Direct Tax Commissioners for the non-payment of taxes.

The record contains the praecipe, summons, and declaration, issue joined, certain deeds of conveyance, two certificates of tax sales, the instructions asked for by counsel on both sides, a verdict and judgment, also a *certiorari* from the United States Circuit Court, and an order of said court dismissing suit and remanding it back to the State court.

There is nothing in the record showing that anything was excepted to on either side during the progress of the trial, or that any testimony, except the deeds and tax sale certificates, was introduced, or that the instructions were either given or refused by the court. The record contains no bill of exceptions or assignment of errors.

Where there is no bill of exceptions to show how the court decided, it will be presumed that it decided correctly. *Bailey vs. Clark*, 6 Fla., 516; *Dibble vs. Truluck*, 11 Fla., 135.

Unless the testimony is brought before the court by a bill of exceptions, it cannot be regarded. *Ibid*.

The party excepting must, at his peril, place so much in his bill of exceptions as shows that the court did err to his prejudice, for the presumption is in favor of the rectitude of their proceedings, and all decisions made will be presumed correct, until the contrary appears. *Proctor vs. Hart*, 5 Fla., 468.

This court is confined in an action at law to the questions made by the bill of exceptions. *Pons vs. Hart*, 5 Fla., 461.

Ex parte Crane, 5 Peters; *Gray vs. Belden*, 3 Fla., 114.

The record gives the instructions asked by the respective counsel, without showing whether they were given or refused by the court. Nor does the record show that they were excepted to by defendant if given. Nor is there any evidence by which this court can determine whether the court below erred, or was fully sustained by the evidence that may have been adduced on the trial.

The whole is left to conjecture.

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Even where there is a bill of exceptions, if the bill is so loosely drawn as to leave the matter in doubt, the proceeding below will be sustained, and this, notwithstanding there be some reason to suspect that error might have intervened. *Proctor vs. Hart*, 5 Fla., 468; *Pone vs. Hart*, 5 *ibid.*, 460; *Gray vs. Belden*, 3 Fla., 114.

The proper function of a court in a writ of error is to pass its judgment upon the points excepted to in the opinion of the court below, and not to decide the law of the case. *Bradstreet vs. Potter*, 16 Peters, 318.

The proper way to get facts before an appellate court, in such form as to make them evidence, is to make a statement of them in the shape of a bill of exceptions, and then get the circuit judge to sign and seal them, and order it to be made a part of the record. *Broward vs. The State*, 9 Fla., 422.

Unless counsel except to the rulings of the court as they arise during the progress of the trial, it is too late to make the objection in the Supreme Court. *Francis, A Slave, vs. The State*, 6 Fla., 306; *Lathrop vs. Judson*, 19 How., 66.

The court cannot adjudge the instructions given to the jury erroneous, unless the evidence upon which the instructions were intended to bear are presented by the bill of exceptions. *Harrison vs. Booker*, J. J. Marshal, 317 and 318; *Vassee vs. Smith*, 6 Cranch, 226, 233, note.

It must appear by the record that the exceptions were taken while the jury were at the bar. *Phelps vs. M. Mager*, 15 How., 160; *United States vs. Brietling*, 20 How., 252.

Although a question be objected to, yet if no exception be actually taken and signed, it will be deemed abandoned. *Scott vs. Lloyd*, 9 Pet., 419.

The ruling of a court below in admitting or rejecting evidence, can only be brought up by bill exceptions. *Suydam vs. Williamson*, 20 How., 427; *Schuchards vs. Allen*, 1 Wallace, 359.

When an objection is taken to the ruling of the court, such ruling, must be stated, and it must be stated that the party

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then and there excepted. *Pomeroy vs. Bank of Indiana*, 1 Wal., 592.

If the foregoing authorities are applicable to this case, it is claimed by appellee that the judgment of the court be affirmed as in the cases cited, viz.; *Pons vs. Hart*, and *Procter vs. Hart*, *Dibble vs. Truluck*, and the others.

RANDALL, C. J., delivered the opinion of the court:

This case comes up by a writ of error issued out of this court on the 15th day of December, A. D. 1868.

It appears by the record before us that an action of ejectment was commenced in the circuit court of Nassau county in 1866, by the defendant in error, against James T. Frisbee, since deceased, to recover possession of certain lots in the city of Fernandina. The defendant, Frisbee, filed his plea denying generally the allegations in the declaration. The record does not show a consecutive history of the proceedings upon the trial, nor what testimony was given on either side, but shows that a verdict of a jury was rendered in favor of the plaintiff below, and against the defendant below, on the 22d day of December, A. D. 1866, and that judgment was duly entered and signed on the same day in accordance with the verdict.

There appears in the record a paper purporting to be a copy of a writ of *certiorari* issued out of the Circuit Court of the United States for the Northern District of Florida, bearing date the 14th day of December, 1866, and filed in the circuit court of Nassau county on the 18th day of December, 1866, commanding the judge of the Nassau circuit court to send and certify the record and proceedings in this case to the said United States Circuit Court, and commanding the State court to cease all proceedings therein. The said paper purporting to be a writ of *certiorari* was tested in the name of the district judge of the United States Court for said district, and instead of a seal there was written in the margin thereof the words, "Seal of the United

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States Circuit Court, Wm. P. Dockray, Clerk.” For the better information of this court the original papers on file in the office of the clerk of the circuit court of Nassau county have been procured by an order duly entered for that purpose, and thereby it appears that the paper purporting to be a writ of *certiorari* issued by the clerk of the United States Circuit Court, is correctly and literally copied into the record, and the said original is not under the seal of said court, nor properly tested in the name of a United States Circuit Judge, or of the Chief Justice of the Supreme Court of the United States, according to the rules and practice of the Federal courts.

The circuit court of Nassau county did not regard said writ as a writ of *certiorari* properly issued, and did not stop its proceedings, but proceeded with the case to trial and judgment. Neither does it appear that the Circuit Court of the United States took any steps to enforce obedience to such pretended writ of *certiorari*, but afterwards, to wit, on the second day of February, 1867, issued a writ of *certiorari* in due form of law, which was obeyed by the State court, and the proceedings therein were duly certified to said United States Circuit Court.

Afterwards, in January, A. D. 1868, the said United States Circuit Court quashed the last-mentioned writ of *certiorari*, and remanded the suit to the State court for want of jurisdiction in a case of this character. It will be observed that this writ of *certiorari* was issued after judgment was recovered in the State court. It thus appears that the first-mentioned paper purporting to be a writ of *certiorari* was treated as utterly null and void, both by the State circuit court and also by the court from which it purported to have been issued. We see no reason to differ with them in this view. It was no writ.

There are other papers copied into this record purporting to be papers on file, and certified to be “full, true, and complete copy of all papers, records, and proceedings on file” in the case. Among these papers are a certificate of the tender of certain taxes signed by the United States Tax Commissioners; a deed

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of trust signed by the President of the Florida Railroad Company and certain trustees, duly acknowledged; a power of attorney; a deed of the premises in question by the said trustees to the plaintiff below, executed by an attorney in fact; and several certificates of tax sales executed by the tax commissioners. There are also copies of certain supposed "instructions" on the part of the plaintiff and the defendant, upon which the court was asked to charge the jury.

There is nothing to show that the aforesaid deeds, conveyances, tax certificates, &c., were offered by either party, or received in evidence, or rejected by the court, nor what testimony was used upon the trial; nor that the instructions asked for were given or refused by the court.

The plaintiff in error assigns as errors:

I. That the court erred in proceeding with said cause after the filing of the writ of *certiorari*.

II. That the verdict and judgment were null and void, as there was no cause pending in said State court.

III. In admitting as evidence on the trial, the deed of Geo. W. Call, attorney, to prove title in Timanus from the trustees, &c.

IV. There being no other evidence of title in Timanus than the deed from Call, the court should have instructed the jury to find for defendant below.

V. The certificates of the United States Tax Commissioners were evidence of title in defendants below, and therefore the verdict was contrary to the evidence, &c.

These points are already sufficiently disposed of by the foregoing statement of the case upon the record. There is nothing here showing that a "writ of *certiorari*" was served before the trial and judgment, and there is nothing to show what evidence was before the court.

Courts will not consider the question whether there was any evidence to be submitted to the jury, unless the opinion of the court was therein prayed for and an exception regularly taken.

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4 Howard U. S., 123; 16 Curtis U. S., 44; 6 Wendell, 564; 20 Howard, 427.

In the absence of a bill of exceptions showing the testimony given on the trial in the court below, the presumption is that there was full and adequate evidence before the jury to warrant and support the verdict. The law having entrusted the courts with the administration of justice, it is always presumed that every tribunal by whom a cause has been tried has done what was right, unless the contrary appears upon its records; and unless this does appear, an appellate court will not reverse or interfere with the decision of an inferior court. Dibble vs. Truluck XI. Fla., 135; Horn vs. Gartman, 1 Fla., 64; Derman vs. Bigelow, do., 281; Union Bank vs. Call, 5 Fla., 409; Pons vs. Hart, do., 457; Procter vs. Hart, do., 465; Bailey vs. Clark, 6 Fla. 516; 1 Call, 28; 4 Rand., 317; Burk vs. Clark, 8 Fla., 9; 1 Cranch, 309; 5 Rand., 31; 2 Leigh, 321; 16 Peters, 318; 1 J. J. Marshall, 317.

These questions seem to have been so often decided, and the practice so well settled upon sound principles, that we see no reason to add anything further.

The judgment of the circuit court must be affirmed.

**FRANKLIN BRANCH AND EDWARD A. CLARK, APPELLANTS, vs.
WILLIAM R. WILSON, APPELLEE.**

1. Where a verdict is clearly against evidence, or clearly in disregard of preponderating evidence, it will be set aside and a new trial granted.

2. Where upon a sale of property, a note being given for the price, and a bill of sale given in terms conveying the present title to the property, yet if there be a subsequent independent agreement to deliver the property sold at a future time, and the seller refuses or fails to deliver the property, the defendant may avail himself of these circumstances to defeat a recovery, upon suit brought by the payee upon the note.

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Appeal from the Circuit Court for Hillsborough county.

The case is fully stated in the opinion of the court.

Papy & Peeler, for Appellants.

John A. Henderson, for Appellee.

HART, Justice, being disqualified, this case was heard by the other members of the court.

RANDALL, C. J., delivered the opinion of the court:

William P. Wilson, plaintiff in the court below, brought an action of assumpsit against the appellants in 1866, upon a promissory note, of which the following is a copy

“One day after date we, or either of us, promise to pay William P. Wilson, or bearer, the sum of five thousand dollars for his negro woman Anna, and her four children, this 12th day of September, 1863.

F. BRANCH,

E. A. CLARK.

The declaration contains three counts: 1. Upon the note. 2. For price and value of the negro woman and her four children. 3. Upon account stated.

The defendant pleaded: 1. General issue. 2. Want of consideration; alleging that the negroes mentioned were never delivered. 2. That the currency contemplated in payment of the contract was Confederate bonds. 4. The defendant afterwards filed an additional plea, alleging that the delivery of the woman and children was a condition precedent to the plaintiff's right of recovery, and it was not complete until such delivery; that defendant demanded delivery at the time and place appointed for delivery, but that plaintiff failed to deliver, &c.

The plaintiff joined issue upon the pleas. A verdict was given in favor of the plaintiff, and his damages assessed at \$2823.07, and the defendants moved for a new trial, which was refused, and the defendants appealed.

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The plaintiff introduces in evidence the note above mentioned, and also a bill of sale of the negroes, whereby the plaintiff "granted, bargained, sold and confirmed" to the defendant, Branch, the said negro woman and her children and agreed to warrant and defend said negroes to the defendant against himself and all other persons; which was signed and sealed by plaintiff September 12, 1863.

The plaintiff having rested his case the defendants introduced as a witness C. R. Mobley, who testified that the note and bill of sale were given in his presence, and he witnessed the latter. Branch and Wilson were at witness's store at the time. Branch asked for paper to draw up a bill of sale, and was furnished a form-book. He wrote from the form-book until he came to the word "delivered" then turned to Wilson and said: "If the negroes are to be delivered, and I am to take immediate possession now, I will put in the word 'delivered;' if I cannot get possession now, I will not put it in." Wilson became excited and said: "I cannot deliver them now"—was moving his effects, and the woman was not well. Branch said he was afraid to leave them there, as they might run away to the Yankees. Wilson said he would risk all that; that there was not a particle of danger of that; he would have them there by Monday evening, to be delivered on Tuesday morning, at the house where Mobley was then living. Branch wanted to take home a little girl for a nurse. Wilson said he would not part them, but would deliver them as a whole in Tampa, at Mobley's drug store. Mobley testifies he was at home on Monday and Tuesday following. Branch came on Tuesday. The negroes were not delivered. Heard Branch say to Wilson on Tuesday that he came to demand the negroes. Wilson replied: "It's of no use to demand the negroes, he knew they were gone away—they were gone to the Yankees, and Branch could not get what he did not have." The note was given on the Saturday previous, and is pretty sure it was near six o'clock when the contract was made. Branch handed the note to Wilson and said he would send

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for the Confederate bonds as soon as possible and pay the note.

William T. Haskins, for defendant, testified: Dr. Branch and I were walking down the street and met Wilson. Dr. Branch remarked, he "would like to get those negroes this morning." Wilson replied: "They are gone." Dr. Branch said: "But you know that you were to deliver them this morning." Wilson said: "I can't help it—they are gone."

J. S. Haygood, for defendant, testified: Knows the negroes mentioned in the note. Met Wilson on Monday morning. He said his negroes had gone to the Yankees. Heard Wilson say he was to deliver them on Tuesday.

John T. Givens, for defendant, testified that he heard Wilson say substantially the same thing as to his negroes having all gone.

Henry Ferris, for defendant, testified that he was present on Monday morning at a conversation between Dr. Branch and Wilson. Wilson said: "All my negroes are gone; they went last night." "Dr. Branch didn't seem excited at all."

Wm. P. Wilson, plaintiff, testified that he sold Dr. Branch the negroes on the 8th September, 1863, for \$5,000. Money was not paid. Dr. Branch wanted me to keep them for him ten days; liked them and would take them, but might not get the bonds from Tallahassee in ten days. On Saturday, September 12, was at Mobley's store. The doctor said he was ready to settle for the negroes. I said, "Very well, you had better draw up a bill of sale." Mobley handed Dr. B. a form-book and paper, and he wrote the bill of sale. I signed it, and Branch gave the note. As I was going out he said: "Mr. Wilson, I have changed my mind; insisted of your keeping them ten days, I will send my wagon on Tuesday morning, next, so I may bring their bedding and clothing and all of them." Said he came to town for the express purpose of taking Rachel home with him in the buggy, but on reflection thought he had better take them all together. I remarked, It was better not to separate them. All this occurred before three o'clock. After the trade I used

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the same care with them as when they were mine. Went to town on Monday morning. After the trade and taking the note I never considered the negroes mine. Had several good offers for them, but would not sell. Went to Mr. Mobley's store and saw Dr. Branch. He took up a paper, and turning it around said: "You had better take this paper, it is no use to me." I said: "No, I prefer keeping your note." He told me he did not intend paying one cent of it.

Wm. B. Henderson and John T. Lesley, for plaintiff, testified as to the value of the negroes in September, 1863.

John Darling, for plaintiff, testified that Dr. Branch came into his store on one Saturday, and said he had purchased the negroes, and couldn't take them out because he didn't have his wagon there; was not going to take them till Tuesday.

Franklin Branch, defendant, testified: Went to Mr. Wilson's; examined the negroes; told him I thought they would suit my wife—would see her, and if she was satisfied with my representation of them I would be back on Saturday and take them at his price. He said Dr. McMickan thought the woman could not be safely moved for eight or ten days. I replied, if I purchased I should be my own judge as to the time of removing them. He said there were several persons wanting them. I requested him to keep them till Saturday, that I might have the refusal of them if they should suit my wife, to which he said he would let no one have them till Saturday. On Saturday met Mr. Wilson at Mobley's store, and told him I had come to buy the negroes. Handed him the note to see if it was satisfactory. He said I had better write a bill of sale. Wrote one from the form-book. Coming to the word "delivered" in the form-book, I said to Wilson: I cannot introduce the word "delivered," for the negroes are not yet delivered. Mr. Wilson signed the bill of sale, and I stepped to the desk to fold it; he picked up the note and was putting it in his pocket. I said to him: "As you have my note, I now demand the delivery of the negroes." He became agitated, and said: "No, no, Dr. Branch, I cannot deliver

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them now, my property would be all exposed," &c., and he would have to move first; that on Monday evening he would bring them over to my place occupied by Mr. Mobley, and deliver them to me on Tuesday morning. I replied, "I am not willing to do it—you live so near the line the Yankees may come up and carry them off, or they may run away." He replied "That will be my risk, for I will deliver them to you on Tuesday morning;" would not deliver me the girl until he delivered all.

The above is the substance of the testimony. The appellant's counsel assign error as follows:

The court below erred in overruling the motion for a new trial, because:

1. The verdict of the jury was against the instructions of the court.
2. It was contrary to the evidence.
3. It was not warranted by the evidence.
4. It was contrary to the principles of law applicable to the case.
5. It was against the weight of evidence.

It is contended on the part of the appellee, that all the terms of the sale were complied with on the part of the appellee; that the giving of the note for the price, and the execution and delivery of the bill of sale conveying his right and interest in the property and warranting the title, was a completion of the sale of the property so as to vest the title and immediate right of possession in the purchaser, and that the seller's actual possession thereafter was that of a bailee of the purchaser, and that the jury having passed upon all the facts, the verdict should not be disturbed.

On the other hand the appellant contends that the point of delivery was a vital point in the case, and that the jury must have disregarded the whole of the oral testimony of the defendant's witness; that the matter of the delivery was the subject of arrangement entirely distinct from the note and the bill of sale, was purposely left out of that part of the contract, and

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was the subject of entirely separate negotiation between the parties; that the plaintiff agreed to deliver the negroes at a future day, expressly taking the risk of loss until a delivery at a future day; that he failed to deliver on the day appointed, and that the purchaser had no right or power to take actual possession, and could not maintain an action for such possession until the time agreed upon for delivery by virtue of the bill of sale and agreement, and that such failure to deliver was a failure of the consideration of said note; or that the consideration expressed in said note not having been delivered by the plaintiff, in pursuance of the bargain and sale, there was in fact no consideration for the note.

The testimony of Mobley and Branch shows that that part of the contract relating to the time of delivery was purposely omitted from the bill of sale, and afterwards made the subject of a separate arrangement after the execution of the note and bill of sale, the plaintiff expressly refusing to deliver at the time, but agreeing to deliver at a given subsequent time and place. Mr. Wilson does not expressly contradict their testimony, but gives a narration of what occurred somewhat inconsistent with theirs in some respects; and on the following Monday and Tuesday, after the plaintiff alleged that the negroes had gone beyond his reach, the plaintiff not only did not claim that the property had passed by the sale, but spoke of *his* negroes having gone. The testimony of Mobley, Haskins, Haygood, Givens, Ferris, and Branch all goes to show that the plaintiff regarded the negroes as his own at the time of their loss. Mobley, Haygood, Haskins, and Branch prove very conclusively that the plaintiff had agreed to deliver on Tuesday, and Mobley and Branch say that he expressly refused to deliver the negroes after the writings were exchanged, and said that he could not deliver them then, and they would remain where they were at his (plaintiff's) risk until the time of delivery fixed upon by him.

The time for the performance of the condition of a sealed as well as a simple contract, may be enlarged by parol. 1 Esp. N.

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P. 35; Dearborn vs. Cross, 7 Cowen, 48; Fleming vs. Gilbert, 3 Johns., 528.

An independent substantive agreement connected with the subject matter of the contract, may be proved by parol. Cobb vs. O'Neal, 2 Sneed, 442; Leinan vs. Smart, 11 Humph., 308; 2 Stark. Ev., 551-5.

The consideration of the note in suit was the sale and delivery of the property. The note was delivered, and the property was to be delivered at a subsequent time, by the terms of the arrangement. The delay in the fact of delivery was, according to the positive testimony, not expressly contradicted, a delay sought and insisted upon by the plaintiff, and for his express benefit and convenience. Indeed he absolutely refused to make delivery at the time, and at the time appointed made excuses for non-delivery, and wholly failed to do so.

In Massachusetts it has lately been held (97 Mass., 166) that in an action on a note by the payee against the maker, the defendant may recoup damages caused by the plaintiff's depriving him of part of the consideration of the note. Parsons on Contracts, 246, says: "*Recoupment* we consider to belong rather to cases where the same contract lays mutual duties and obligations on the two parties, and one seeking remedy for a breach of duty by the second, the second meets the demand by a claim for a breach of duty against the first."

If the plaintiff sue on one part of a contract consisting of mutual stipulations made at the same time, and relating to the same subject matter, the defendant may recoup damages arising from the breach of another part; and this whether the different parts are contained in one instrument or in several, and whether one part is in writing and the other by parol. Batterman vs. Pierce, 3 Hill, 171; Ives vs. Van Epps, 22 Wend., 155.

There is a natural equity, especially as to claims arising out of the same transaction, that one claim should compensate the other. This principle is now almost universally adopted in the common law courts, instead of compelling the defendant to

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resort to his cross action for any damages he may sustain by the act or omission of the other party with reference to the subject matter of the contract.

It seems to me that the jury in this case must have entirely disregarded the testimony, or clearly to have decided against the strong preponderance of testimony, in regard to the agreement concerning the delivery of the negroes; and to have decided it solely with regard to the supposed legal effect of the bill of sale, keeping out of view the fact which appears to be shown, that the plaintiff refused to make a present delivery (after the signing and delivery of the note and bill of sale) of the negroes for which the note was given, and expressly assumed the risk of the loss which subsequently occurred. If this be true, the plaintiff is seeking to compel the defendant to pay him for property sold, which he at the time refused to deliver, and was afterwards unable to deliver for causes beyond the control of the defendant. In this aspect of the case we are disposed to direct that the facts be again submitted to a jury.

Where there is conflicting testimony, and the verdict seems to have been given against evidence or in clear disregard of strong preponderating evidence, it will be set aside; and in *Sanderson vs. Hagan*, 7 Fla., 318, the court say it is its imperative duty to set it aside and grant a new trial.

The judgment is reversed and a new trial awarded.

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JOHN MORRISON, APPELLANT, vs. JOHN L. MCKINNON, AP-
PELLEE.

1. Though a court make an incorrect ruling as to the admissibility of testimony, if it be afterwards corrected, and such testimony admitted in time to give the party all the benefit of the facts sought to be proved, such erroneous ruling will not be ground for granting a new trial.

2. It is discretionary with a court whether to compel a party to join in demurrer to evidence.

3. Where there is testimony tending to prove the concurrent understanding and intention of the parties as to the particular terms of a parol agreement, and the jury have passed upon it, the verdict will not be disturbed, particularly where the charge of the court was proper.

4. The statute of usury, Th. Dig., 234, §1, refers to contracts of the loan of money or things of value for a specified interest or compensation for their use, *according to their value*; and such contracts as provide for a certain uncontingent repayment of the principal sum or value, and a certain uncontingent rate *in value* for its use; and unless a contract is in violation of this principle, it does not come within the prohibition of the statute; and therefore,

5. A contract to repay one and a half bushels of corn, within a year, for one bushel advanced, is not within the prohibition of the statute of usury, because the value of the article is fluctuating, and the increased quantity may not be equal in money value at the time of payment, to the value of the principal or thing loaned at the time of the loan.

6. Relationship, by affinity to one of the parties within the ninth degree, is, by the common law, a ground of challenge of a juror. But where a juror is called who is "first cousin to plaintiff's wife's mother," and the defendant being present makes no objection, and does not afterwards show that he was unawares of the relationship, (though his counsel does make an affidavit to that effect,) and it does not appear that the persons through whom such relationship existed are still living, such cause is not sufficient to set aside a verdict, especially when there is no evidence that the juror is in fact influenced from that cause.

Appeal from Walton Circuit Court.

The case is fully stated in the opinion of the court, to which reference is made.

John Morrison vs. John L. McKinnon—Opinion of Court.

McLean and McLean, for Appellant.

D. L. McKinnon, for Appellee.

RANDALL, C. J., delivered the opinion of the court:

John L. McKinnon, Appellee, sued Morrison, Appellant, in a justice's court in 1867 upon an account for fifty-seven bushels of corn at \$2.25 per bushel, and for hauling corn, \$6, giving a credit for thirty bushels of corn, claiming a balance due of \$66.70.

On the trial, judgment was rendered for the plaintiff, and defendant appealed to the circuit court. On the 8th of April, 1868, the cause was tried in the circuit court, and a verdict rendered for the plaintiff for sixty-eight dollars and sixty-four cents.

The defendant then appealed to this court.

The record shows that Neill L. McKinnon testified on behalf of the plaintiff, that in the spring of 1865 Murdock Morrison, son of defendant, came to plaintiff's place with an open note. Plaintiff was absent, but witness was his agent and read the note, the purport of which was to ascertain whether defendant could get some corn of plaintiff. Witness told the defendant's son that defendant "could get some corn on the same terms he was letting others have it, which was, a bushel then for a bushel and a half to be returned in the fall, and that if his father wanted it he must send after it quickly or it would be gone." The next day witness delivered to defendant thirty-eight bushels of corn, defendant sending his carts therefor. Had refused two dollars per bushel, in specie, for corn, but had refused to sell for money, as he wanted the corn in return, plaintiff not seeing any prospect of raising a crop himself. In the spring of 1866 defendant paid back thirty bushels of corn, delivering it ten miles away. Worth fifty cents per hundred to haul it home. Defendant's counsel asked witness: "What was corn worth at the time defendant received the thirty-eight bushels?" This question was objected to by plaintiff's counsel, on the ground that the corn was not due until the fall of the year. The court sustained

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he objection, and defendant excepted to the ruling. Witness further testified that he wrote no note back to defendant, and did not ask the defendant's son what authority was delegated to him, or if he had any.

A. C. McCallom testified that he was present when defendant's son came to ascertain whether his father could get corn from plaintiff, and heard the first witness tell him that his father "could get corn as others were getting it from him, at a bushel then for a bushel and a half in the fall." Several others got corn there that day on the same terms. Corn was very scarce.

The plaintiff testified that he had refused two dollars a bushel for it; did not want money, but wanted corn in return. Defendant paid him thirty bushels of corn in the spring of 1866, but delivered it at a distance from his residence; "but if he was not mistaken defendant promised to pay for the hauling."

Another witness testified that corn was worth \$2.25 in the fall of 1865.

On the part of the defendant, Murdock Morrison testified that his father sent him with the note to McKinnon inquiring if defendant could get corn from plaintiff. Witness had no other authority except to carry the note and inquire if corn could be had. Don't recollect N. McKinnon saying defendant would have to pay a bushel and a half in the fall for a bushel then. Does not recollect informing defendant that McKinnon said anything, except that he could get corn, and to come after it quickly.

John Morrison, defendant, testified that Murdock Morrison was not his general agent, was not authorized to transact all his business, nor in any particular trade, occupation or property that in 1865 he sent him with a note to plaintiff inquiring if he could get corn. Did not contemplate borrowing corn to be paid in the fall. Intended to pay what it was worth at the time received it. Defendant's son on returning said he had delivered the note to Neill McKinnon, who said, tell witness he could get corn, and must come for it quickly. Did not tell him that

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would have to pay a bushel and a half for a bushel. Did not know that others were getting corn on those terms. Corn was at that time worth one dollar per bushel, and there was plenty of it in the country, &c. The first that witness knew of plaintiff's intention to charge one and a half bushels for one bushel, was after the corn was procured; and to avoid difficulty he had let plaintiff have thirty bushels in the way of payment; when he learned that plaintiff intended to charge one and a half for one bushel, he ceased paying. Paid the thirty bushels when it was worth \$2.25. In the spring of 1865 it was worth one dollar.

John L. Campbell testified that corn was worth one dollar in specie in spring of 1865. A. C. Monroe testified that corn was worth \$2.25 in the fall of 1865 and spring of 1866.

The testimony being closed, the defendant's counsel *proposed* to demur to the testimony, and plaintiff's counsel refused to join in demurrer. The court ruled that plaintiff could not be required to join in demurrer, and defendant's counsel excepted.

The defendant's counsel asked the court to charge the jury upon several points referred to in his assignment of errors, and took exceptions to the ruling thereon.

The court charged the jury that "if you believe from the evidence the defendant obtained the corn from plaintiff under a special agreement to pay a bushel and a half for a bushel, you will find for the plaintiff [excepted to by defendant]; but to charge the defendant under the special agreement he must have known and assented to it." "If the jury shall find that the defendant had no knowledge of any special agreement, he will be only liable to pay the price at which corn was selling at the time he received it." "If the jury find from the evidence that the defendant has paid all that he was liable to pay, they will find for the defendant."

At defendant's request the court further charged the jury, "If you find from the evidence that Murdock Morrison was a special agent and had no authority to make such a contract, you will find for the defendant."

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The defendant's counsel asked the court to charge the jury also that the plaintiff dealt with the witness, Murdock Morrison, at his peril, unless he inquired into his authority as an agent, which the court refused.

The defendant's counsel also asked the court to charge the jury that if a contract was established by which the plaintiff was to receive more than six per cent. interest, the statute of usury was applicable; the court refused so to charge, and defendant excepted.

After the verdict, defendant's counsel moved for a new trial on the grounds that the verdict of the jury was against the law, and against the evidence and contrary to the charge of the court; and also upon the ground that one of the jurors was related to the plaintiff by affinity; and to support this last ground, the record says that the counsel for the defendant made an affidavit that he conducted the selection of the jury, and was not aware that Beck, one of the jurors, was related by affinity to the plaintiff, but he is informed and believes that he was so related; and the return further states that to the above was attached the affidavit of the plaintiff, that he was a "first cousin of the said juror's wife's mother."

The court refused to grant the motion for a new trial, and exceptions were taken.

The Appellant assigns the following errors:

1. The court erred in sustaining the plaintiff's objection to defendant's proving the value of the corn at the time it was produced.

II. The court erred in ruling that plaintiff's counsel could not be required to join in demurrer to the testimony, after the testimony was closed.

III. In refusing to instruct the jury that "if you believe from the evidence that Neill L. McKinnon, agent of plaintiff, did not inquire into Murdock Morrison's authority, then he dealt with him at his own peril, and you will find for the defendant."

IV. The court erred in refusing to instruct the jury that th

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statute of usury in force when the contract was made applies not only to money but to merchandise, and if they find from the testimony that the plaintiff has loaned defendant corn at the rate of more than six bushels per annum interest on the hundred bushels, it is usury; and that a contract that defendant should return the corn and interest at the rate of one bushel and a half for a bushel, the interest is usurious, the contract illegal and void, and verdict will be given for defendant.

V. The court erred in refusing to grant a new trial upon the motion of defendant's counsel in the court below; and for other reasons apparent in the record, the judgment should be reversed.

As to the first assignment of error, it is plain that the inquiry into the value of property sold, without a special contract as to price, must be confined to the value at the time of the sale; but where a payment is to be made in specific articles, without reference to value, as corn, &c., the inquiry must be as to the value of the article to be delivered at the time appointed for delivery; and the court erred in sustaining the plaintiff's objection to proof of the value at the time of the purchase, the question as to the existence of a special contract being in issue in the case. But though the court may have erred in refusing to receive the testimony, it seems that the defendant was afterwards permitted to prove the value at the time of the purchase or loan, and thus he had the benefit of the proposed testimony. Though a court make an incorrect ruling, if it be afterwards corrected in time to give the party all the benefit sought by the testimony offered, such erroneous ruling will not be good ground for granting a new trial.

As to the second assignment of error. It is discretionary with the court whether to *compel* a party to join in demurrer to evidence. A demurrer to evidence ought not to be allowed where the party demurring refuses to admit the facts which the other party attempts to prove; nor where he offers contradictory evidence, or attempts to establish inconsistent propositions.

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Young vs. Black, 7 Cranch, 565; Starkie on Ev.; Ph. Ev., notes, pp. 1008, 1010.

As to the third assignment of error.

It seems from the evidence that McKinnon was disposing of his corn to persons in the community only upon the terms of one bushel and a half, to be delivered at a future day, for one bushel disposed of. The son of the defendant brings the note of the defendant desiring to get some corn. He is told that his father could get it upon the same terms as others, one bushel for a bushel and a half in the fall, if he would send quickly. It is admitted by defendant's son (as well as by defendant himself) that he conveyed so much of this message as related to the sending for it "quickly," and when defendant is asked whether Murdock Morrison was his general agent, he is particular to reply that "he was not authorized to transact *all of his business* in any particular trade, occupation or property." The jury, it seems, from all the circumstances concluded that he was his agent in this purchase.

It appears from the testimony that for particular reasons the business of the people of the county was carried on rather through a system of barter and exchange than purchased by what was then circulating as money, and defendant shows his knowledge that McKinnon was thus disposing of his corn, when he writes to *get* corn, rather than to purchase it, and when he sends at once for it without further inquiry as to the price.

In this case there were many circumstances which were subjects for the consideration of the jury; the witnesses were examined in their presence, and from the circumstances, they no doubt concluded that the defendant or his authorized agent was fully informed of the terms upon which plaintiff was disposing of his corn, and that he accepted them; and we are not disposed, in a case of this character, the facts having been passed upon by the jury, under a proper charge by the court as to the law of contracts, to disturb the verdict. See 1 Met., 93; 1 Cushing, 89.

The fourth assignment of error is, that the judge refused to

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charge that the contract was within the statute against usury, &c.

This statute reads as follows: "No person or persons shall upon any further contract whatever, take, directly or indirectly, for the loan of any money, wares or merchandise, bonds, notes or other commodities whatsoever, above the rate of eight dollars for the loan of one hundred dollars for one year," &c.

Every law must be construed with reference to the subject matter and to its intent. Was this law relating to the rate of interest to be charged or to be contracted for upon a loan of money, and creating certain penalties for taking more than certain rates for the use of money or things of money value loaned, intended by its framers to so operate as that the owner of a horse worth one hundred dollars should not contract for his loan and use day by day or week by week, at a greater rate than eight dollars per annum; or that the owner of a wagon should not receive above eight per cent. upon its value for its use; or that the owners of cattle may not receive for their use the natural increase, or other like cattle, or that the owners of corn may not have in return a portion of its increase, though it be an hundred fold?

This statute refers to contracts of the loan of money or things of value, and prohibits the taking of a greater rates of interest or compensation for the use of a *certain amount in value*, and whether it be money or goods so loaned, the contract must refer to a certain uncontingent repayment of the principal *sum* or *value*, and a *certain uncontingent* rate *in value* for its use. (Ord. on Usury, 29, 69, 72).

The distinction to be observed in the character of the two classes of contracts is obvious. The price or value of merchandise and commodities is fluctuating, as shown by the testimony. Corn in 1865, when purchased or borrowed by the defendant, was worth say one dollar per bushel. In 1866, it was worth two dollars and a quarter. If the fact had been reversed, and the price had fallen from two dollars and a quarter to one dollar,

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the plaintiff would have made a bad speculation; yet he could not complain, because it was his own proposition.

The construction of the law insisted upon by the defendant would be an observance of the *letter* to the sacrifice of its spirit. "A thing which is within the statute as if it were within the letter; and a thing which is within the letter of the statute, is *not* within the statute, unless it be within the intention of the makers." Bac. Abr., Stat. I., 5, 10.

Transactions of this character are very common in agricultural communities, and have been the subject of judicial criticism in nearly all the States. In a case requiring an interpretation of the statute of usury in New York, *Spencer vs. Tilden*, 5 Cowen, 144, which arose upon an agreement to let six cows for four years, the defendant to return twelve cows with calves by their sides, it was proved that the six cows were worth one hundred and fourteen dollars, and that the twelve cows and calves were worth two hundred and four dollars, at the end of the four years, the court says: "The contract was not usurious, though the plaintiff was a very hard and unconscionable creditor. It was uncertain, in 1819, what would be the value of sows in 1823. Here was no negotiation for a loan of money. It was a bargain by which the plaintiff was pretty certain of making a handsome profit, but by which he might lose." And *Holmes vs. Wetmore*, cited *ib.*, 149, was upon the following agreement: "Aug. 26, 1819. Ebenezer Holmes received of Ezra Wetmore ten ewe sheep, for which I promise to deliver twenty sheep of as good quality, three years from date." On the trial sheep were proved to be worth one dollar in August, 1822, and judgment was given for plaintiff for twenty dollars damages. Judgment affirmed. In *Hamlin vs. Fitch*, Kirb. Conn. Rep., 260, the court says: "To bring a contract within the statute, and the mischief it was made to prevent, it must be clearly for the repayment of a *greater value* than the amount of the loan, with an advance thereon at the rate of six per cent. per annum. That it be of a

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greater quantity, though of the same kind of article, is not sufficient. A loan of one hundred bushels of salt, for example, in 1783, when it was worth twelve shillings, to repay double the quantity at the end of the year, when it might have been worth but four shillings, would not come within the statute, be the price what it may at the year's end. The contract in this case, though in the form of a loan, was really in the nature of a speculation and bargain of hazard. It depended upon a contingency, to wit, that of depreciation, whether all, or how much of the principal or value loaned, should be repaid, and which of the parties the speculation would ultimately favor, which takes the contract entirely out of the statute." 2 Burr., 891.

The fifth ground of error is that the court refused a new trial upon the defendant's motion, one of the grounds of which was the relationship by affinity between the plaintiff and one of the jurors. No authorities are cited in the appellant's brief, and perhaps the appellant intended to abandon the position. At the common law, relationship within the ninth degree is ground of challenge of a juror, for favor; and even to the array, where the sheriff who summoned the jury was so connected. But when the parties omit to challenge, strong reasons must be shown for the omission. Here, the appellant's counsel makes affidavit that he was not aware of the relationship when the jury was drawn; but the appellant himself being present says nothing. Nor do the affidavits show that the parties through whom the relationship once existed are still living. In *Cain vs. Ingham*, 7 Cowen, 478, the sheriff summoned as a juror "one Clapsaddle, whose father had married the widow of the defendant's brother. Clapsaddle's father died before the trial." A motion being made to set aside the verdict for the incompetency of the juror, and the plaintiff not showing a good excuse for not challenging, the motion was denied. The court say: "It is going too far to say that matter of mere evidence upon challenge to the juror, matter which is undefined and infinitely diversified and multifarious, shall be a cause for setting aside a verdict, when it

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is accompanied with no evidence that the juror is in fact influenced from that cause.”

The amount involved in the case at bar is small, and this is probably the last case that may come before this court, originating in a justice's court, yet on account of the industry and zeal of the counsel in preparing and presenting it, as well as the interesting nature of some of the questions raised, it has received as earnest consideration as though the amount had been more important.

The order refusing a new trial, and the judgment, must be affirmed, with costs.

SILAS GLADDEN, PLAINTIFF IN ERROR, vs. THE STATE OF
FLORIDA, DEFENDANT IN ERROR.

1. Under the statutes of this State regulating the subject at the time of this trial, there must have been fifteen grand jurors on the panel as originally drawn.

2. After organization of the grand jury, in accordance with the terms of the statute, their proceedings are governed by common law rules, and the improper discharge of one member of the grand jury does not vitiate its proceedings if a sufficient number to find an indictment remain.

3. Every indictment must be found by at least twelve, but it is not necessary that all above that number should be present consenting.

4. The rules of law in granting continuances in civil and criminal cases are substantially the same, except so far as they are modified by the difference in proceedings. In criminal cases, however, the grounds for the motion should be scanned more closely than in civil cases, on account of superior temptation to delay.

Character much must be left to the tribunal before

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unless it is a plain and palpable instance of the arbitrary and oppressive exercise of the discretion necessarily vested by law.

6. In applications for a continuance it must be shown by affidavit that the witness has been duly served with a subpoena, or a satisfactory reason assigned for the omission, and when it is not served, and the time at which the subpoena is issued is not disclosed, nor the residence of the witness stated, so that this court can determine the propriety of the order of the court below in these respects, this court will not interfere.

7. General objections to questions addressed to witnesses, without stating the precise ground of objection, are vague and nugatory, and if entitled to weight anywhere are without weight before an appellate court. If any grounds of objection were stated in the court below, the bill of exceptions should disclose them, and when they do not so appear this court will not pass upon them when urged here by way of argument or embodied in the assignment of errors.

8. A past quarrel or encounter, if sufficient time for the cooling of passion has transpired, does not justify the killing of an unarmed man with a deadly weapon.

9. The court, after charging as to the different grades of homicide and the requisite evidence to support them, is not bound on the motion of either party to repeat the same charge in substance, though varied in terms.

10. An instruction to the effect that "if you believe from the evidence that the prisoner killed the deceased through fear or cowardice, or under the belief that great bodily harm is about to be done, although there was no danger to life or great bodily harm, it will be a justifiable killing, and you will acquit," is properly refused. Every person is presumed to be sane, and he should be held responsible for reasonable deductions. The belief must be reasonable; there must be reasonable ground for apprehending a design to take away life or do great bodily harm, and reasonable ground for believing the danger imminent that such design will be accomplished at the time of the killing.

11. Before a person can avail himself of the defense that he used a deadly weapon in the defense of his life, and be justified, he must satisfy the jury that the defense was necessary at the time; that he did all he could to avoid it, and that it was necessary to protect his own life or to protect himself from such great bodily harm as would give him a reasonable apprehension that his life was in immediate danger.

12. What facts justify or excuse a homicide is a question of law. It is

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the province of the court to state what the rules of law are as to facts, and of the jury to determine whether such facts exist in the particular case.

13. It is within the province of the court, after defining the different grades of homicide, to restrict its charges to points of law arising upon the facts, being careful to give such instructions as cover all reasonable deductions.

14. The prisoner, in a capital case, must be personally present during the whole of the trial, and at every step taken in the cause. He has the right to discuss questions, both of law and of fact, and no step can be taken in his absence.

Writ of Error to Circuit Court for Jackson county.

The plaintiff in error was indicted for the murder of Addison Fullerton. On the morning of the day of the homicide, the prisoner and deceased met casually at a house called the "Tidwell Place." A difficulty occurred there between the parties.

Eliza Jane Tidwell (for the defense) testified in reference to this antecedent difficulty: "That the parties met at the Tidwell Place. That Mr. Gladden said: 'Addison, I suppose you are going to sell me out.' Mr. Fullerton replied: 'Attend to your business and I will attend to mine. It ain't me going to sell you out, it is the sheriff. I don't want your property.'" Whereupon, the witness states: "Fullerton jumped up with his knife in his hand and run at Mr. Gladden, run him around the smoke house, then jumped in the door and got the gun, ran out in the piazza and presented the gun at Mr. Gladden and said to him, 'God damn you, leave here. I will kill you before sundown if there is powder and lead to do it.' Mr. Gladden then mounted his horse and rode off."

Other witnesses testify about the same, and also state that when Gladden was running around the house, and Fullerton was following him, he (Fullerton) said "he would cut his lights out."

Another witness, W. W. Tidwell (for the State), in detailing what he saw of this previous difficulty, says: "I was at Tidwell's place. I saw both parties. The first I heard was a re-

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mark of Mr. Gladden. He told Mr. Fullerton to shut his mouth. Mr. Fullerton told him he would not do it. Then Mr. Gladden jumped up and said: 'By God, I'll make you do it.' Fullerton then got up. Mr. Gladden struck Fullerton with a stick, a common-sized walking-stick. The stick was cracked. After the blow Mr. Gladden ran and Fullerton took after him. Gladden ran out one door, round the smoke-house, out of the gate, and jumped on his horse. When he got on his horse Gladden said to Fullerton, 'I will kill you before the sun goes down.' Fullerton replied, 'I can shoot as much as you.'

Gladden, after riding off, went to his house, distant about one or one and a quarter miles from the place of difficulty, and returned with his gun. He was absent from a half to three-quarters of an hour. Upon his return he shot and killed Fullerton. The circumstances are thus stated in substance by the witnesses:

John Johnson (for the State): "Addison Fullerton was shot by Silas Gladden. I was pretty close when he shot him—was thirty or thirty-five steps from Gladden. I was sitting in the house, when some one in the house said: 'Yonder comes Mr. Gladden with a gun.' I looked out the door and saw Mr. Gladden on horseback. He reined up his horse. Mr. Fullerton, who was a few yards ahead of Mr. Gladden, was walking off from him. Fullerton stopped and turned his face towards Mr. Gladden. While he was turning Gladden raised the gun, and about the time Fullerton was turned, the gun fired. I think the distance between the parties at the time of firing was about fifteen or eighteen yards. Fullerton stood up a moment and then fell."

W. C. Grant (for State): "Fullerton was killed by Gladden. I saw Gladden shoot him down. When I got to the door, heard Mr. Gladden, who was on horseback, order Fullerton to stop. Fullerton, who was on foot, told him he would not do it. Mr. Gladden told him he would make him stop, and put his gun to his face and fired. Fullerton walked about five steps and fell. He lived about a minute and a half. Mr. Fullerton was not

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armed. He had a branding-iron twelve or fifteen inches long in his hand when he was shot.”

Lucy Ditty (for State): “I saw Gladden shoot Fullerton. I saw Mr. Gladden come up with a gun. Mr. Fullerton was going from him. Gladden told Fullerton to stop, and as he stopped and turned around Gladden shot him.”

W. W. Tidwell (for State): “Mr. Gladden came up behind Fullerton and told him to stop. Fullerton said he would not do it. Mr. Gladden told him, ‘I will kill you, then.’ Mr. Fullerton said he was ready to die. Mr. Gladden presented his gun and fired. Mr. Fullerton had a branding-iron in his hand.”

J. F. McClellan for Plaintiff in Error.

J. C. McLean for the State.

WESTCOTT, J., delivered the opinion of the court:

Silas Gladden, the plaintiff in error, was indicted for the murder of Addison Fullerton at the spring term, 1868, of the circuit court for Jackson county.

As the case is decided for the most part upon purely legal grounds, we deem any lengthy statements of the facts unnecessary.

From a careful inspection of the first page of the record we find that only fourteen persons “were drawn to serve as grand jurors during the term” at which the indictment was found. The statutes regulating the organization of grand juries cannot, by any known rule of construction, be held to authorize this, and while no such error is assigned by the plaintiff, yet it is apparent upon the record, and this being a capital case the court cannot pass it by without notice. No man should be tried for a capital crime upon an indictment of this character. Otherwise not being assigned as error, and not mentioned in argument, it would be proper to pass it by.

There must be fifteen grand jurors on the panel as originally drawn. 17th Ohio, 224; 5 Eng., 71; 1 Blackf., 320.

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This is an error which reaches all subsequent proceedings, and we might well dispose of the case upon that ground ; but some of the errors assigned raising important questions of criminal law and practice we deem it proper to notice them.

On the first page of the record the following entry appears:

“The grand jury came into court and reported that they, by their foreman, had excused John W. King, one of their number, from attendance on grand jury on yesterday, before any investigation was had before them.”

Plaintiff in error viewing this action of the grand jury such as vitiated all of their subsequent proceedings, plead in abatement at the proper time, that “during the term of said court one of the jurors was excused by that body from serving on said jury, and did not serve as a grand juror during the term of the court at which the bill of indictment was found.”

Upon demurrer to this plea, this question arose, viz.:

Whether, after the legal organization of a grand jury, the absence of one of its members, by permission of that body, from its consultations, and his failure to act with the others in finding a bill of indictment, is a good plea in abatement. The judgment of the court sustaining the demurrer is the first error here assigned.

It is insisted for the plaintiff in error that “the grand jury as a body could exercise no judicial powers, and could not adjudicate as to the qualifications of any of their number,” and that this was a judicial act.

Without passing upon this question, it is evident that the act of excusing a juror, whether by the court or the grand jury, even though improper and for insufficient cause, cannot vitiate their subsequent action if his presence was unnecessary. The practice of excusing grand jurors from attendance is one which should not be encouraged, but at the same time we cannot see that the absence of one grand juror, however improperly permitted, vitiates their proceedings if the requisite number necessary at common law to find a true bill remain.

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In Alabama a grand jury legally constituted of thirteen members under the statute, is competent to act, although it may be subsequently reduced by the absence of one juror to twelve. 3d Ala., 343.

In Indiana, by statute, the names of eighteen men are to be drawn from the box for the purpose of being summoned as grand jurors. The grand jury, however, when convened may consist of any smaller number not less than twelve, as at common law. 1st Black., 317.

In North Carolina it is held that the statute upon the subject of a grand jury is only directory to the court, and does not declare void a bill or presentment found by a grand jury consisting of the common law number. 2 Ired., 153.

So in Tennessee the acts upon this subject were held to be only directory as to the number beyond which jurors shall not be sworn upon the grand jury, and the number twelve will constitute a sufficient number to act. 3d Humph., 49.

In Iowa the statute providing for the organization of a grand jury is held by the courts to be mandatory and peremptory. It provides that "when grand jurors are to be selected their number *must* be fifteen, and they *shall* serve for one entire year thereafter." Here it was held that the whole number must act. 3d Green, Iowa, 515.

It was held in *Portis vs. The State*, 23 Miss., 538, that if after a grand juror has been irregularly discharged a sufficient number to constitute a legal grand jury remain, the body will preserve its organization, and its acts will be valid, provided no substitute be sworn in.

The statutes of this State regulating the subject do nothing more than simply provide for the mode and manner of the organization of a grand jury and the number of which it is to be composed. After an organization in conformity to the statute, the common law rule applicable should control, which is, "That every indictment and presentment by the grand jury must be found by twelve at least, but it is not necessary that all above

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that number should concur in such presentment or indictment.”
3 Bac. Ab., par. 725.

In this case, whether the act of the grand jury in discharging one of its number be proper or not, it does not follow that the grand jury were rendered illegal.

After the discharge of the grand juror a sufficient number remained to constitute a legal grand jury, and if there had been originally fifteen grand jurors on the panel no such consequence would have resulted.

The judgment of the court sustaining the demurrer was correct, and there was no good plea in abatement.

The next error assigned is the refusal of the court to grant a continuance upon a motion based upon an affidavit containing the following grounds for the motion:

“That defendant cannot safely go to trial at this term of the court on account of the absence of Jane Anderson, who is a material witness for this defendant, and by whom he expects to prove that at the altercation between him and Addison Fullerton, which terminated in the death of the latter, Addison Fullerton was the aggressor; that said Fullerton commenced the difficulty and assaulted this defendant with a deadly weapon, to wit, a knife, and pursued him with the same while the defendant was fleeing from him, and that when the defendant got beyond the reach of the knife of the said Fullerton, that he, Fullerton, attempted to shoot the defendant with a gun, and inquired for powder and lead for that purpose, and then said to defendant that he would kill him before the sun went down if powder would burn; that while the said Fullerton was pursuing the defendant with his drawn knife they were both running rapidly around the house, and Fullerton using such expressions as, ‘Damn your soul, I will have your heart’s blood. I will cut out your lights;’ that a subpoena has been issued for the said Jane Anderson, but has not been served; that he does not believe he will be able to procure her attendance at this term of the court, but that he will be able to procure her attendance at the next

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rm of this court; that the said Jane Anderson is not absent, ther directly or indirectly, by any cause or procurement of is; that she is the only witness by whom he expects to prove all these facts; and that this application is not made for purposes of delay only, but that justice may be done.”

There were two affidavits and two motions made, but we consider only that which was based upon the strongest grounds.

The terms at which this case was tried commenced April 27th, 1868; the prisoner was indicted April 30, and this application for continuance was made seven days afterwards, upon the 7th of May.

The rule in granting continuances in civil cases as held in this State is, “that when a party applies in a civil court for a continuance for the term, on the ground of the absence of a witness, it must be shown by affidavit, *that the witness has been duly served with a subpoena, or a satisfactory reason assigned for the omission*; that he is absent without the consent of the party directly or indirectly given; that he resides in the county where the suit is pending, or if out of the county good cause must be shown for not taking his deposition; that the testimony is material; that the applicant expects to procure said testimony at the next term; that the application is not made for delay only; that he cannot safely proceed to trial without evidence of said witness; and the party must further state the facts expected to be proved by the witness.” 9 Florida, 490.

What is the rule in criminal cases? Is more or less required?

In speaking of motions for a continuance, Sutherland, J., 7 Cowen, 390, says: “The rule is substantially the same both in civil and criminal cases, though in the latter the authorities all agree that the matter is to be scanned more closely on account of the superior temptation to delay and escape the sentence of the law.”

In speaking of a similar motion, Grimke, J., 1 Bay, 1, 2, says: “The rule of law for putting off trials is the same in criminal in civil cases.”

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In the absence of a statute similar to ours upon the subject of continuances, it has been held that the exercise of this discretion cannot be reviewed on error. 6 Cranch, 206; 15 Ala., 43; 6 Iredell, 98.

It was held in Virginia that it would not be controlled unless the case was a very plain one. 2 Virginia Cases, 6.

In Georgia a writ of error will not be sustained on account of the court below refusing to grant a continuance in a cause, unless it is a most plain and palpable instance of the arbitrary and oppressive exercise of the discretion necessarily vested by the law. 1 Kelly, 215.

The statute creating the Supreme Court of Georgia made this discretion the subject of review.

While the doctrine in Alabama and North Carolina cannot prevail here, where we have a statute making it the subject matter of review, yet, unless it is apparent that the discretion has been exercised in an arbitrary and oppressive manner, to the manifest injury of the defendant, we will not control it.

An appellate tribunal should never, except in a plain case, control discretion of this character in matters of practice, as it has not the opportunity of knowing many things which should to some extent control in its exercise, and which the court before which the case is tried knows necessarily.

As remarked by the court in 12 Grattan, 576, "Applications for continuances are addressed to the discretion of the court, and much must be left to the tribunal which has the parties before it, and must determine from a variety of circumstances *occurring in its presence* whether applications are made in good faith "

A careful examination of this affidavit will disclose that the date the subpoena was issued is not stated, and that it does appear that it had not been served. It is impossible for us to know from the record when the subpoena was issued, nor can we learn any reason for the want of service. There may or may not have been one.

It will be noticed that the place of residence of the witness is

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not disclosed in the affidavit, and that so far as it states the inability of defendant to procure the attendance of the witness at the term, it is general and is based upon belief. The subpoena may have been issued two hours before the affidavit was made, and the witness may have resided within five miles of the court, and the failure to serve may have been the result of the laches of the defendant in getting his writ issued. All of this might be so, and still be consistent with the facts set up in this affidavit. The court below had it in its power to inspect the papers and ascertain whether it had been returned, and if not, it could ascertain from the officer when it came to his hands.

The court, in *People vs. Baker*, 1 Cal., 404 say: "We think the affidavit does not show a case upon which the court could be required to grant a continuance. It does not show due diligence on the part of the defendant in endeavoring to procure the attendance of his witness. It does not appear at what time the subpoena was issued, at what time the witness left the county, or what efforts were made to procure a service of subpoena upon him."

These remarks are entirely applicable here, and we adopt them.

A party assigning as error matters of this character under the statutes, which are to a great measure within the discretion of the court below, must see that his record disclose all the facts necessary to show to this court an arbitrary and improper exercise of discretion. When the record is uncertain or silent, all presumptions are in favor of the ruling.

Under the circumstances we do not think the record presents such a case as calls for the interference of an appellate tribunal as to this assignment of error.

The third, fourth, fifth, sixth and seventh errors assigned, consist principally of exceptions to the rulings of the court admitting or refusing to admit questions to witnesses.

In the view we have taken of the case, it is unimportant to consider them further than to remark that the record fails to dis-

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close the grounds of objection which were stated and brought to the attention of the court below, if any were stated.

In 3 Howard, 575, the court say, when reveiwing the action of the court below in overruling general objections to the reading of depositions where no ground of *objection appears from the record to have been stated*: "We must consider objections of this character as vague and nugatory, and if entitled to weight anywhere, are without weight before an appellate court." If any grounds of objection were stated in the court below, the bill of exceptions should disclose them, and when they do not so appear, this court will not pass upon them, urged here, unless the matter is of a very serious character. Indeed, the authorities indicate that they should not be heard at all. 5 Barb., 406; 1 Cowen, 622; 1 Hill, 91; 1 Wendell, 418; 12 Wendell, 504.

It is not enough to embody the grounds of objection in the assignment of errors, or to urge them by way of argument.

If the grounds of objection do not appear in the bill of exceptions, they cannot properly be considered. After the bill of exceptions is signed, nothing to the contrary can be averred and no omission supplied. 3 Dall., 38; 1 Bac. Ab., 529; 2 Cain, 168; 5 Bos. & Pull., 36.

The eighth error assigned is based upon general exception to the entire charge of the court upon the subject matter in hand, without stating, so far as the bill of exceptions disclose, any particular ground.

The general charge to a limited extent may be wanting in certainty, but we deem it unnecessary to refer to it at length.

The refusal of the court to give the following charges asked for by the defendant is assigned as error:

First. If the jury believe from the evidence that the prisoner at the time he killed the deceased had reason to apprehend death or great bodily harm to himself unless he kills the party, the killing is justifiable. To constitute a danger to the life need not be of immediate death, but of such an injury as will shorten the period of the person's earthly existence.

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This instruction, under the facts in this case, was properly refused. It is to the effect that if the prisoner at the time he killed the deceased had reason to apprehend death or great bodily harm unless he kills, he is justified. In this case there had been a previous encounter some half an hour before the killing, and at the time of the killing deceased was in no situation to do harm to the defendant.

At the time he killed the deceased he may have had reason to apprehend generally bodily harm from this previous encounter, from feelings then engendered and threats then made. There may have been reasons in one sense for such an apprehension, but they could have been no justification for the killing unless the deceased was in such a situation at the time of the killing as to endanger defendant's life or place him in danger of great bodily harm. Such an apprehension is one of the requisites to justify, but there must be in addition acts of the deceased happening and transpiring at the time of the killing, or at any rate not at a remote period. A past quarrel or a past encounter, if sufficient for the cooling of passion as would justify the killing of an unarmed man with a deadly weapon, and yet such a past quarrel may be in some sense a reason for a general apprehension of great bodily harm for some time afterwards.

The last portion of the instruction is, "to constitute a danger to the life need not be of immediate death, but of such an injury as will shorten the period of the person's earthly existence. We cannot see how there can be "a danger to the life," yet no danger of immediate death, unless the danger to life from some remote cause not then existing and actively present.

This instruction is not only defective in this respect, but think the charge of the court was explicit and full up point so far as it was legal.

The court, after charging as to the different grades of homicide, requisite evidence to support them, is not

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on the motion of either party to repeat the same charge in substance, though varied in terms.

If an instruction is asked involving a principle not before stated, and yet applicable, the court might give it or modify its own charge to cover the principle. 8th Eng. Repts., 317.

The second instruction asked and refused was: "If you believe from the evidence that the prisoner killed the deceased through fear or cowardice, or under the belief that great bodily harm is about to be done, although there was no danger to his life or great bodily harm, it will be a justifiable killing, and you will acquit."

This instruction is based upon the doctrine enunciated in the case of Grainger vs. The State, 5 Yerger, 459, and is in effect that the act is justified if the prisoner killed the deceased under the belief that great bodily harm was about to be done, although there was no such danger.

The facts in the case are certainly very different. In Grainger vs. The State, the court say: "Grainger used all the means in his power to escape from an overbearing bully. He shot only to protect himself from threatened violence, and that great. He behaved like a timid and cowardly man, was much alarmed, and was cut off from the chances of probable assistance." Here, at the time of the killing, Gladden was on horse, back several yards off with a gun in his hands, and his victim without any like weapon, in no position to strike or even to defend himself.

Independent of the facts, however, every person is presumed to be sane, and the law holds him responsible for reasonable deductions, and when we cease to hold him responsible to such an extent we are in a labyrinth of never-ending uncertainty.

The belief must be reasonable; there must be reasonable ground for apprehending a design to take away life or to do great bodily harm, and reasonable ground for believing the danger imminent that such design will be accomplished then. 2 Comstock, 193; 1 Park. Crim. Repts., 154.

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Before a person can avail himself of the defense that he used a weapon in defense of his life, and be justified, he must satisfy the jury that that defense was necessary at the time; that he did all he could to avoid it, and that it was necessary to protect his own life or to protect himself from such great bodily harm as would give him a reasonable apprehension that his life was in immediate danger. 1 Archbold's Crim. Pldg. & Pract., 796; Reg. vs. Smith, 8 Car. & P., 160.

The next instruction asked and refused, numbered five, so far as it had any application to the case, and so far as it should have been given, was embraced sufficiently in other charges of the court.

The next instruction, numbered six, and refused, was: "You must be the judges whether the danger must be immediate or unavoidable at the time of killing. To justify the prisoner in the act must depend upon the facts and circumstances of the whole state of facts before him as proven before you."

What facts justify or excuse the killing is a question of law not to be determined by the jury.

What facts are sufficient to excuse the act may be stated by the court, and it is the province of the jury to determine whether such facts exist in the particular case.

The next instruction, numbered eight, which was asked and refused, was properly refused for the reasons stated in the previous portion of this opinion. It is within the province of the court, after defining the different grades of homicide, to restrict its charges to such a state of acts as exist. Under the laws of this State the court must confine its charge exclusively to points of law; but as every charge upon a point of law must be based upon a given state of facts, it is not the duty of the court to extend their charges beyond what is properly embraced within the testimony adduced. It should be careful, however, to give instructions covering all reasonable deductions of fact.

Thus, in a case where there was no question as to the use of a deadly weapon, as in this case, and where the testimony of

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all the witnesses to the act was explicit as to this fact, it is within the province of the court to restrict its charge to such points of law as are applicable in a case where the use of a deadly weapon may or may not be justified.

The last error assigned is the denial of the motion for a new trial upon the several grounds alleged.

We will consider but one of them, which was the absence of the prisoner from the court for some minutes three several times during the progress of the trial—at one time when one of the State witnesses was being examined, at another when a witness for the defense was being examined, and a third time during the argument of counsel. The absence was voluntary, but without any express waiver of his right to be present.

It is unnecessary for us to determine whether the prisoner can waive his right to be present during the trial, or whether a simple voluntary absence upon his part can be held to be a waiver of his constitutional right, and authorize the State to proceed in in his absence. These questions have been settled in this State.

This court has laid down the rule very broadly, and has, perhaps, extended it beyond the views of the courts of some other States.

In *Holton vs. State*, 2 Fla., 500, the court say: “During the trial of a capital case (the whole trial) the prisoner has a right to be and *must be present*. *No steps can be taken by the court in the trial of the cause in his absence. The prisoner charged must be present in court to make his objections to any and every step* that may be taken which he may deem illegal.” According to this view there was manifest error here, and the court should have awarded a new trial. We do not propose to examine the cases upon the subject. It is a decision covering the precise point.

Let the judgment of the circuit court of Jackson county be reversed, the indictment quashed, and the prisoner held to answer a new bill of indictment to be preferred against him,

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and the cause be remanded for further proceedings in accordance with this opinion.

If, however, upon an accurate examination of the record of the court below, it appears that the grand jury, when organized, consisted of fifteen persons, it is then ordered that a new trial be awarded, and that the cause be remanded for further proceedings in accordance with this opinion.

JASON GREGORY, PLAINTIFF IN ERROR, vs. ADAM MCNEALY,
DEFENDANT IN ERROR.

1. In an action by the bearer of a promissory note against the maker, a plea setting up "that the plaintiff at the time of the commencement of the suit did not possess, and was not seized in his own right of the legal title to the promissory note, the same not having been assigned or transferred to him by the original payee thereof, or by any other person having the legal thereto," is not a good plea.

2. Possession by plaintiff *in his own right* at the commencement of a suit upon a note payable to bearer is not essential to a recovery. Possession by an agent or trustee is sufficient to maintain an action at law *in* his own name as bearer, and proof of agency only results in permitting the defendant to avail himself of any defense against the principal which he may have.

3. A plea of this kind is not available unless it sets up that plaintiff is possessed *mala fide*, or by casualty without consideration.

4. Plea of an assignment of such a note to plaintiff by a party not having the legal title would not defeat the action. It should go further, and set up that it was not acquired *bona fide*, and for a valuable consideration without notice.

5. The entry, "this day came the parties by their attorneys," preceding a judgment *nil dicit*, which is followed by a direction to stay execution embodied in the judgment, accompanied with partial payments upon the execution, when issued, held to be evidence that the parties were present when the judgment was entered, and that a plea of the character mentioned was abandoned.

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6. When there are good counts and bad counts in a declaration, and there is a plea to the good counts upon which issue is joined, and the issue is undisposed of, yet if the plea is bad in substance, a judgment of the court below, which is warranted by the good counts, will not be reversed upon a writ of error.

The opinion states the case.

D. P. Holland for Plaintiff in Error.

Papy and Peeler for Defendant in Error.

WESTCOTT, J., delivered the opinion of the court:

This was an action of assumpsit brought by Adam McNealy as the holder or bearer of a promissory note of which the plaintiff in error was maker, which note was payable to Allen H. Bush, or bearer. The declaration contains a count upon the note in all respects properly drawn, and the usual common counts—the common counts, however, being in blank so far as the statement of the amount of money sought to be recovered under them is concerned, and hence defective.

The defendant appeared and subsequently filed pleas. These pleas were, first, the plea of the general issue to the common counts, and a plea in response to the count upon the promissory note, alleging “that the plaintiff at the time of the commencement of this suit did not possess and was not seized in his own right of the legal title to the said promissory note sued on, the same not having been assigned or transferred to him by the original payee thereof, to wit: Allen H. Bush, or by any other person having the legal title thereto.”

Upon this plea issue was joined. At a subsequent term in October, 1866, the following judgment was entered:

“Now, on this day came the parties, by their attorneys, and the defendant saying nothing in bar or preclusion thereof, it is therefore considered by the court that the plaintiffs have and recover of and from the defendant the sum of two thousand

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three hundred and forty-four dollars and eighty-eight cents, and his costs in and about the suit in this behalf expended, *and that execution be stayed until the first day of January, next.*"

It appears from the record, that after the rendition of the judgment, execution was stayed until the January following, when it was issued, and that subsequently the sum of eleven hundred and seventy-two dollars was paid upon the execution on the 4th of March, 1867.

The rendition of this judgment, in the condition of the pleadings as stated, is assigned as error.

The first and third errors assigned, which we propose to consider together, are in substance that "the judgment is *nil dicit*, while the record shows that pleas were filed and issue joined on the second plea."

It is contended in argument by the plaintiff in error that the second plea here filed was a good plea, and that this being the case, a judgment *nil dicit* when there is a *good plea* filed upon which issue has been joined is erroneous; while it is replied by the defendant in error, that the second plea here filed is not a good plea in substance, that the record discloses that it was abandoned, and that the court will, upon a review of the whole case as it appears from the record, affirm the judgment if these two propositions be correct.

It was held in the case of Hooker vs. Galligher, 6 Fla., 352, that "it is error for the court to give a judgment by default as for want of a plea when there is a *good plea in the case* upon which issue has been joined." It may be remarked that the record in this case disclosed that it was a plea of set off, and there was affirmative evidence that it had not been abandoned by defendant.

In Thomas vs. Brenn, 1 Stewart, 412, the court held that where there was a good plea, proper in form and substance, undisposed of, and there was no evidence of abandonment, the judgment was erroneous.

We think, from these and other authorities, that whatever

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may be the rule where the plea is *good*, if the plea is not a good one, then a failure to dispose of it cannot be assigned as error in an appellate tribunal, for the very plain reason that to send a case back to try an issue which, whether found one way or the other, could not affect the judgment, would subserve no good purpose, and would be an absolute delay of justice upon a matter of simple form admitted to be immaterial so far as the ultimate result is concerned.

Accepting this as the correct rule, the question arises, Is this a good plea in this action?

This plea viewed in one way, sets up two defenses, and in another but one. That portion of the plea consisting of the words, "the same not having been assigned or transferred to him by the original payee thereof, or any other person having the legal title thereto," may be regarded as simply explanatory of the preceding statement, "that the plaintiff at the time of the commencement of this suit did not possess, and was not seized in his own right of the legal title to the said promissory note sued on."

The rule is that each plea should present but one distinct matter of defense, and this is no doubt the legal effect of the plea here; but we will consider it in that view which is most beneficial to the defendant.

In this view, is it a good plea?

It is in substance that the plaintiff was not possessed in his own right, at the time of the commencement of the action, of this promissory note, and that it had not been transferred or assigned to him by the payee thereof, or by any other person having the legal title thereto.

This is a note payable to bearer, and two questions arise upon this plea.

First. Is it necessary that the plaintiff, at the commencement of this suit, shall have been possessed of the note in *his own right* to maintain the action; that is to say, could he not have

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sued in his own name if he had been in possession as agent or trustee of the payee or bearer, or in some other way?

Second. Admitting that the note had been transferred or assigned to him by some person not having the legal title, would this alone have been a good plea?

The plea setting up that he was not possessed *in his own right* admits the general fact of possession alleged in the declaration; but to avoid it, denies that the possession is of such character as in the estimation of the pleader is required by law to sustain the action.

No doctrine is better established than that possession of a note payable to bearer by an agent or trustee is sufficient to sustain an action at law in his own name. Proof of agency does not defeat the remedy. Its result is that the defendant is permitted to avail himself of a defense against the principal party. Notes endorsed in blank, and those payable to bearer, have many like incidents. Both go by delivery, and possession proves property. It is not enough to say that plaintiff is not possessed in his own right; you must go further and say that he is possessed *maïa fide* or by casualty, such as a loss by owner and finding by him, plaintiff.

In *Livingston vs. Clinton*, 3 Johnson's Cases, 264, the law is stated to be that "if a note is endorsed in blank, the court never inquires into the right of the plaintiff, whether he sues *in his own right* or as trustee. Any person in possession of the note may sue, and may in court, if necessary, fill up the blank and make it payable to himself."

A decision to the like effect in March, 1800, was affirmed in the Court of Errors in New York in the case of *Cooper vs. Kerr*.

In 7 Cowen, 176, *Mauran vs. Lamb*, Assumpsit by bearer, against drawer of a check payable to bearer, it was admitted that the plaintiff had no interest in the check, but sued for its owner with her consent. Defendant contended that plaintiff was not the proper person to bring the action; that he was a mere agent; that the right of set-off might be defeated by this

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contrivance, and defendant deprived of the testimony of the nominal plaintiff. Plaintiff replied that no inquiry could be had into the right of the holder to bring the action, unless it appear that his possession was *mala fide* and that defendant was not precluded from any equitable defense. Say the court: "It is contended that the plaintiff being a mere agent and having no interest, cannot maintain this action. It appears that the plaintiff came fairly by possession, and his name was used for the benefit of Mrs. Remson, claiming to be the person in interest. The rule is that the holder of a note payable to bearer need not prove a consideration unless he possesses it under suspicious circumstances. If a question of *mala fide possessio* arises, that is a fact to be raised by defendant and submitted to the jury."

Chief-Justice Parsons, in *Baylet et al. vs. Taber et al.*, 6 Mass., 453, says the plaintiffs are not bound to prove in what manner they acquired the property of notes payable to bearer, unless the defendants will first show that a former lawful holder of the notes lost them, or that they were unlawfully taken from him, and then the plaintiffs would recover if they could prove that they acquired them *bona fide* and for a valuable consideration in the usual course of negotiation, without notice of the manner in which the former holder lost his possession of them.

We revert to the second question. Had the note been assigned by a party not having the legal title, would this proof alone have defeated the action? Certainly not. If this note had been lost, and the finder of it as bearer had sued the maker, his action would have been met by a plea that he came to be bearer by casualty without consideration, viz., by loss by the true owner and his finding, but if he, the party finding delivers the note to another party, the plaintiff here for instance, for valuable consideration without notice, he has his action against the maker, because here the plea of *mala fide possessio* is not available. 3 Burr., 1516; 1 Salk., 126.

There is a very strong case cited in 3 Burr, where the holder

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of a bank note recovered against the cashier of the bank, though the mail had been robbed of it and payment was stopped, it appearing that he came by it fairly and upon a valuable consideration. It is hardly necessary to say that there is no difference in this respect between a bank note and such a note as is the basis of this action here. The holder of a note payable to bearer, which passes by delivery, need not make title through an assignment or transfer. He may claim as bearer. If he acquired it from payee's endorsee he may sue upon the direct promise to pay bearer, and the endorsement of the payee's endorsee would have no more effect upon the promise in favor of bearer than the promise in the note to the payee has. 1 Mason, 243; 3 Porter, 229.

So far has this doctrine been carried, that it has been held that an action at law cannot be sustained on a negotiable note payable to bearer by the holder, *on his proving that the note was lost, though he show that he lost it after it became due*, because the note being payable to bearer, the finder could make out *prima facie* cause of action, and although the note was due when lost, the maker was exposed to the hazard of showing that fact by legal evidence if sued by the finder. It was held that he must seek a court of equity, where the maker would be given indemnity against a subsequent recovery by the party finding it. 3 Cowen, 312. What effect the statutes have upon this subject in this State we do not determine or consider. The facts set up in this plea do not constitute a defense to the action. It is not a good plea, viewed in the most favorable light.

It is however true, that not only is this not a good plea, but the record creates a very strong presumption that the judgment was by consent, or that the pleas being deemed clearly insufficient by defendant, he abandoned them and permitted judgment to pass against him upon condition of a stay of execution. The judgment commences: "And now this day came the parties by their attorneys, and the defendant saying nothing in bar or

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preclusion," &c., and ends: "*and that execution be stayed until the first day of January next.*"

Whether the statement of the appearance by attorney in the connection above is to be conclusive evidence of the fact, is a question which has not been decided by the courts of this State. In 2 Fla., 17, the court seem inclined to the opinion that such an entry would at least be *prima facie* evidence of the appearance by both parties, unless the contrary was shown by some other part of the record.

In the case in Mississippi which was cited by the attorney for the plaintiff in error, in 2 Fla., 17, it was held, that such an entry in a case where there were several defendants, would not be construed to be an appearance by *a defendant not served with the writ*. Such, also, is the doctrine laid down in the case of Moore vs. Parker, 3 Littell. In Thomas vs. Brown, 1 Stewart, 412, where there was a *good plea proper in form and substance* undisposed of, the court held (Judge Safford dissenting) that such an entry preceding a judgment "for want of a plea," was not evidence that the plea was abandoned, and that such judgment was erroneous. This case was subsequently overruled in 3 Stewart, 342, Judge Collier dissenting, who remarked that though it be "a decision founded in error, it is better to permit *communis error facere* begun, than to unsettle the law by disregarding it." The case just mentioned was an action of covenant. Pleas of payment and covenant performed, both good pleas were filed, judgment *nil dicit* without noticing the pleas was rendered by the court below, and writ of inquiry executed. Say the court: "It is objected to the proceedings below that the court erred in empanelling a jury to inquire the damages when there were two pleas filed on which issues were joined, and permitting plaintiff below to take judgment by *nil dicit* although two pleas were not withdrawn.

"It appears from the record that the pleas of payment and covenants performed were pleaded by the defendant, and that issues were joined thereon by the plaintiffs. The next entry is

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as follows: 'Came the parties by attorney, and the defendant saying nothing, judgment is entered by *nil dicit*, and thereupon came a jury of good and lawful men to inquire of damages,' &c. It sufficiently appears from this entry that both the parties were present by counsel when these proceedings took place, and that the defendant did not attempt to sustain his pleas. Were it necessary we might be authorized to infer that the defendant's counsel acknowledged his inability to sustain his pleas by proof, and thus virtually withdrew them; but this is not a necessary implication in support of the judgment. Suppose the case had been put to the jury on the issues, what proof would it have been incumbent upon the plaintiffs to have produced? Strictly, according to common law practice, no proof would have been necessary. The pleas admitted the instrument set out in the declaration."

So in the case at bar the plea admits the note and the fact of possession. This is all that was necessary for the plaintiff here to recover, and had defendant supported his plea and obtained a verdict, plaintiff could well have moved for judgment *non obstante veredicto*.

While we have our views as to what a simple entry of this character may import, and the extent to which it should be held to be evidence of the actual presence of the parties, it is not necessary to express them in this case. In our opinion, this entry unexplained preceding a judgment *nil dicit*, which is followed by a direction to stay execution upon the judgment, accompanied by payments upon the execution, which is the case here, admits of no other reasonable inference or conclusion than that the parties were present and the pleas were abandoned.

To hold otherwise here, would be to say that all presumptions are against the record, rather than in its favor. Here is an entry by the clerk, the officer whose duty it is, under the law, to make it, to the effect that the parties through their attorneys are present, and a stay of execution is awarded in the judgment, something which the court has no right to grant except by con-

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sent, and which is the result of affirmative action by the defendant according to all reasonable presumptions. The court cannot *sua sponte* grant it, and the plaintiff is not to be presumed to surrender a plain legal right to his prejudice under the circumstances here disclosed. Another significant fact is, that the execution was issued on the 10th of January, and on the 4th of March the sum of eleven hundred and seventy-two dollars was paid upon it by defendant. The effect of this payment in the event of a reversal of the judgment we need not consider.

It is further insisted, in support of the errors assigned, that no judgment *nil dicit* after appearance could be given: it being urged that an appearance under the rules of practice amounts to a plea of the general issue, citing Thomp. Dg., 330. The effect of an appearance under the practice in this State, so far as involved in this case, is simply to prevent a judgment for default in appearance at the first term, and to show that the defendant appears and contests the action, and that he claims an imparlance, at least for the purpose of further preparation of his defense, if he shall think proper to continue it in the regular form of pleading. 1 Fla., 382.

It cannot be held under the rules and statutes regulating practice to have such an effect as to obviate the necessity for filing pleas or other subject matter of defense at the proper time, according to the rules prescribing the time at which they should be filed.

These views dispose of the first and third errors assigned.

The second error assigned is: "That the common counts in plaintiff's declaration being in blank are nullities, and no judgment could have been rendered upon them."

The judgment of the court below is warranted by the count upon the promissory note (which was nowhere sufficiently answered), and the facts appearing upon the record; and because there are other counts in the declaration which are defective is no good reason for reversing a judgment sanctioned by the other count, which is good. It is enough, so far as this point is con-

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cerned, that the record upon a full examination justifies the judgment. That which is a nullity should not be permitted to destroy that which is good. The plea of the general issue is restricted to the common counts, and cannot affect the propriety of the judgment upon the count upon the notes.

The fourth and only other error assigned is, that the judgment does not disclose that the damages were assessed by the clerk or a jury.

The statute which regulates the subject of assessing damages upon liquidated demands, not requiring the introduction of a witness, provides that the "court may direct the clerk to assess the damages," etc.

From an inspection of the record, the promissory note sued on, with its interest, amounted to the sum recovered in the judgment, and the necessary presumption is, that the damages were assessed either by the clerk, under the direction of the court, or by the court itself. In either case it would have been proper, according to decisions in other States having a similar statute upon the subject. While strictly speaking, it is proper that the fact that the clerk did assess the damages should be disclosed in the judgment, yet the omission to do so, if the judgment is justified otherwise, is not such an error as will justify its reversal.

Let the judgment of the court below be affirmed with costs.

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**FERDINAND A. HABER AND GUSTAVE OBERBECK, PARTNERS,
AS F. A. HABER & CO., APPELLANTS, VS. WILLIAM W. NAS-
SITTS, APPELLEE.**

1. The general purpose and intent of the attachment laws is to give the creditor protection and security whenever the debtor is committing certain enumerated acts of fraud, or he is in such a situation as either endangers the debt or impairs the remedy for its collection. They should not be so construed as to prohibit the debtor under all circumstances from engaging in every legitimate species of trade beyond the confines of State jurisdiction.

2. The statute authorizes an attachment whenever the debtor is actually removing his property out of the State. *Held*: That although a case in which there is no bad intent, the transaction is fair, the amount of property being removed in comparison with what remains is small, the debtor is solvent, and the debt is not endangered, was within the letter, yet it was not within the spirit or true meaning of the statute.

Appeal from the Circuit Court for Escambia county.

The case is stated in the opinion of the court.

Messrs. Mallory and Maxwell, for Appellants.

The plaintiffs sued out attachment against the goods, &c., of defendant on the ground that he was actually removing his property out of the State of Florida.

The defendant traversed the allegation of removal of property, and thereupon moved to dissolve the attachment. A jury was called, and evidence taken on the issue joined. In the course of the trial the defendant offered to prove that he was not removing his property with any view to defraud his creditors, and that he had sufficient property remaining in the State to pay the debt sued on. To this plaintiffs objected as irrelevant to the issue, but the court overruled the objection; and in accordance with said ruling afterwards charged the jury that they must find for the plaintiff if they should believe the defendant "was re-

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moving the property out of the State," unless they were "further satisfied that it was not done with intent of avoiding the payment of his debt;" and also, that defendant might "show the fairness of the transaction, unless it should appear from the testimony adduced against him." The plaintiffs excepted to these and other parts of the charge of the same purport and asked the court to instruct the jury simply:

First. That if they believed "defendant was removing his property beyond the limits of the State they must find for the plaintiff."

Second. That if they believed defendant was removing any portion of his property beyond the limits of the State, they must find for the plaintiff"—which instructions the court refused.

The jury having found for the defendant, plaintiffs' attorneys moved for a new trial on four grounds:

First. That the verdict of the jury was against the legal evidence in the case.

Second. That the court erred in admitting evidence not pertinent to the issue and calculated to mislead the jury.

Third. That the court erred in admitting evidence of the defendant on other points than that of removal of the property, viz., as to whether his intention by such removal was to defraud his creditors, or defeat them in the collection of their debts.

Fourth. That the court erred in the instructions given to the jury, and in refusing the instructions asked for by plaintiffs' counsel.

Which motion for a new trial was overruled, whereupon plaintiff excepted.

And now in this court plaintiff assigns for error:

First. That the court below erred in permitting evidence to go to the jury to show the *intent* with which the defendant was removing his property.

Second. In permitting evidence to show the value of property retained by the defendant in the State.

Third. In its instructions to the jury, in so far as these author-

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ized the jury to decide upon the intent of the defendant in removing his property, and upon the fairness of the transaction.

Fourth. In refusing the two instructions asked for by plaintiff's counsel.

Fifth. And in overruling the plaintiff's motion for a new trial.

The questions thus presented to the court involve the proper construction of that clause of the statute which authorizes the writ of attachment in case a party owing a debt "is actually removing his, her, or their property out of the State."

The statute provides that the claimant shall make oath "that he or she has reason to believe the party from whom it (the debt) is due will fraudulently part with his, her, or their property before judgment can be recovered against him, her, or them (as the case may be), or is *actually removing his, her, or their property out of the State of Florida*, or about to remove it out of the State, or resides beyond the limits thereof, or is actually removing or about to remove out of the State, or absconds or conceals himself or herself, or is secreting his or her property, or fraudulently disposing of the same." See acts 9th, adjourned Sess., 16, 17.

Very obviously, the clause in question requires, by its own terms, no other fact to be proved than that the debtor is *actually removing his property out of the State*. There is nothing said about his intention, nothing about his object, nothing about the fairness of his act of removing the property. Nor is there anything of this kind left to inference. The words stand there, fully expressing in themselves, plainly and absolutely, the contingency in which the creditor *will* be entitled to the remedy provided by the act. A debtor is actually removing his property out of the State; it may be but a small portion of it, or a larger, or the whole; the only questions are, is it *his* property, and is he *actually removing* it out of the State?

Go a step further, and inquire whether the intention of the Legislature is defeated or imperfectly carried out, by thus restricting the clause to the plain import of its words. What was

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that intention? Certainly not to protect the creditor against the *fraudulent* designs or acts of the debtor, for that was sufficiently done by other clauses of the act. Nor to protect him against the “intent (of the debtor) of avoiding the payment of his debt,” as charged by the judge below, for then he could not have the writ even if the debtor were *removing the whole of his property*, if he were not removing it with such intent; and the Legislature cannot be supposed to have meant any such thing as that. Then, what did it intend? Simply, that the creditor should have the authority to arrest the removal of the debtor’s property beyond State jurisdiction; that the debtor should not seek to put it beyond that jurisdiction, except at the peril of having it summarily attached. If the intention had been broader, if it had been to guard against the *wrong designs* of the debtor, why were no words used to express it? Why leave it wholly to inference? Why say actual removal of property should authorize the writ, and say no more, when the meaning was that its removal should *not* authorize the writ, unless made with this or that intent? This is altogether unreasonable, and must be admitted to be so, when it is seen that bad intent is provided against in other clauses of the act. The court will not put such a stigma upon the Legislature as to hold that that body used words definitely expressing a certain purpose, when in fact *its* purpose could only be reached by constructively adding other words which changed, as much as they enlarged, the meaning of those actually used.

To show that the intention of the Legislature could not have been what is contended on the other side, it is only necessary to refer to the analogous clause of the act, which authorizes attachment when the debtor is “actually removing, or about to remove, out of the State.” It will not be pretended that in such a case the court will permit an inquiry as to his intent, or permit him to show that he has ample property left in the State as well as where he is going, or show anything else which goes to prove that his object is not to defeat his creditors. It will be

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enough that he is actually removing, or about to remove, out of the State. Taking this to be indisputable, why should the debtor be permitted to show that he is acting fairly in the removal of his property in a case such as that now before the court, any more than in the case of the removal of the person, when the language used for both cases is the same.

All that the law requires, is to know in the one case whether the debtor is actually removing his property out of the State; and in the other, whether he is actually removing himself. What constitutes "removing" in the sense of the Legislature may admit of some question, but that once determined, the proof must go only to that point. It seems that the Legislature meant a "removing" in the popular sense as applied to a person. To say a man is "removing" to another State, is understood to imply that he is going there to remain; and, doubtless, that is the sense in which it is used by the Legislature when it authorizes attachment against a person who is "removing out of the State." A visit to a friend across the State line would not be removing. And I see no reason why the Legislature may not have intended the same sense to the word in its application to property; and hence would not consider a man as being in the act of "*removing*" his property, (a horse, for instance,) when he was merely riding him into another State on a visit of pleasure or business. The fact of "removing" would not exist in such a case; and this is the fact the act requires to exist and be proved, which is quite apart from any fact about other property, or any fact relating to the intent of the debtor towards his creditors. If intent be open to inquiry at all, it would be with a view to negative this fact of "removing" the property, because upon this the whole proceeding rests. This does not open the door for further inquiry as to intent of the debtor in other respects, for to show intent in order to prove that a man is not removing his property out of the State, when that is the fact to be proved, has not the slightest relation to intent which goes to prove some other fact required to be proved.

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The construction I have given of this clause is confirmed by the history of the legislation of the State on the subject. This clearly shows the policy to be more and more to favor the creditor. Up to 1859 the law gave the writ, when the debtor "is actually removing out of the State, or resides beyond the limits thereof, or absconds, or conceals himself, (so that the ordinary process of law cannot be served upon him,) or is removing his property beyond the limits of the State, or secreting, or fraudulently disposing of the same (for the purpose of avoiding the payment of his just debts.*)" See Thomp. Dig., 367. This was amended by the act of 1858-9 so as to add to the grounds for attachment the case where a debtor is "about " to remove his property out of the State, and also by leaving out the words "so that the ordinary process of law cannot be served upon him," evidently intending to make the law more stringent against the debtor, enlarging the remedy of the creditor, and lessening the restrictions upon him by striking out the words last quoted. See Pamph. Acts 9th, Sess. 27. Next comes the act of 1859, now in force. That still further enlarged the grounds for attachment, by allowing it in a case where the creditor "has chosen to believe the party from whom the debt is due will fraudulently part with his, her, or their property before judgment can be recovered," &c., and also allowing it in a case where the debtor is "*about* to remove (his property) out of the State:" and lessened the restrictions upon the creditor by dropping the words "for the purpose of avoiding the payment of his just debts." See Pamph. Acts 9th, Adjourned Sess., 16, 17.

Now, the holding of the words of the clause in controversy to their obvious import, accords with the policy of the Legislature to favor the creditor in his remedy. Besides, when by the first and second acts the writ was allowed when the debtor was "removing his property beyond the limits of the State, or secreting, or fraudulently disposing of the same for the purpose of avoiding the payment of his just debts," was not that "purpose" a necessary ingredient in each of the contingencies speci-

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fied, and made so by a proper reading of the whole clause? And if so, why were these words, "for the purpose of avoiding the payment of his just debts," dropped from the last act? Clearly, this was done in order to dispense with the necessity of inquiring into the purpose. But even if these words are to be taken as disconnected with the first member of this clause, relating to the removal of property, it is not less significant that they should have been dropped from connection with the other portions of the clause. It only showed most palpably that the Legislature did not intend, even where it had been before required, that there should be inquiry as to the "purpose" or "intent" of the debtor respecting his debts. Why else should they have been stricken out?

And if inquiry cannot be made into his purpose or intent, wherefore and by what authority will inquiry be made into the amount of the property he may have remaining in the State. If that be done, inquiry must be made as to his debts also. But the act has nothing to direct or authorize either, and it is obviously against the policy which dictated its passage that any such inquiry should be made.

The act thus construed would apply to any removing of property out of the State, whether in the course of trade or otherwise, so it be actual removing, as already explained.

But it is said, such a construction would work great hardship upon the debtor in certain cases. If this be true, the reply is, that it is the fault of the Legislature—not of the law. The hardship is not admitted, however, as the debtor cannot justly complain that the arm of the law constrains summary provision for obligations he has neglected or failed to meet. and the security for which he is lessening by transfer of the property to another State.

Take the reverse view of hardship. It is reasonable to suppose that the Legislature meant to impose upon the creditor the necessity of waiting, where his debtor is actually removing some of his property, until he shall find that only enough is remaining

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to satisfy his debt? If so, when should he move? How long shall he wait? How much must be removed before he can have his writ? There might be ample property, but there might also be debts fully equivalent. Shall the creditor be stayed until he pries into all the business of the debtor, and ascertains accurately the proportion between his debts and property? If neither of these things be required, where is the line to regulate his action? Evidently not a line the law fixes, which should be definite, but a loose and shifting one, depending upon the ingenuity with which a debtor can hide his affairs and purposes. Now did not the Legislature, by its last amendment of the statute, manifestly intend to remove all doubt as to the line, fixing it definitely and restrictively on the simple act of removing the property? To permit a more enlarged scope, places the right of the creditor in hopeless confusion and uncertainty. He could never know when the writ was allowed to him; and even if the debtor were removing his whole property, if the intent is to enter into the gist of his act, there might be proof to show the "fairness of the transaction," which according to the charge of the judge below, would be fatal to the creditor.

It is sought to influence the court by decisions on the statutes of other States. But this court will give effect to the Florida statutes according to the intention of the Florida Legislature, and when cited to other State decisions, will require to be told how the purpose and policy of those States, as well as the language of their acts, correspond with those of this State. The citations of defendant's counsel from decisions in Louisiana, Illinois, Mississippi, and Tennessee, as given in Drake on Attachments, will be of little service to him, unless he can show that the statutes of these States, in their whole scope, as well as in the language of this particular clause of our statute, are of the same purport. What we have seen gives little light on this subject and if the court is not more fully informed than by Drake, will not accept as binding authority what is by him quoted, the absence of a comparison of the entire of those statutes with ours.

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But the case cited from Louisiana, *Russell vs. Wilson*, Drake 69, and the case from Tennessee, *Rungum vs. Morgan*, Drake, were cases resting upon the intention of the debtor as to “actually removing” his property; and the decision would evidently have been different if it had appeared that the property, though in the ordinary course of its use taken back and forth, was then being “removed”—that is, taken out of the State not to be brought back; and in such a case, it is not believed those courts would have permitted any inquiry as to whether such actual removing was or was not for the purpose of defrauding or defeating creditors.

In the Illinois cases, the statute in terms related to removing “property out of the State *to the injury of the creditor*,” thereby requiring such injury to be proved. There is nothing similar to our statute, and therefore the cases do not apply here.

The Mississippi case, as rendered by Drake, page 70, may be in conformity with the decision of the court, but I cannot concede it as good authority; and if good in that State, it must be because her statute policy on the subject is different from that I have shown to be the policy of Florida. Having respect for that court, I am bound to presume this is the case. But I have not access to the Mississippi statutes, and cannot advise the court in what their policy agrees or differs from those of Florida. The construction given to language which corresponds to that of our act, by which the language lags far behind the law as announced, may be explained by other portions of the statute not adopted here. However that may be, this court will not feel itself bound to follow an authority whose decision upon the law of another State is not in conformity with the proper construction of a similar law of Florida.

Relying upon the correctness of the law as I have presented it, its application to this case will entitle the plaintiffs to a new trial of the issue joined below. The fact that defendant was removing goods of his out of the State is proved and admitted by himself. The circumstances under which this was being done,

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were enough to excite the suspicion of his creditors. He was failing to meet his commercial paper—he was selling goods at auction by night and by day—he was sending other goods out of the State, mixed up with goods of another party (Frank) in such a way that all the goods were believed to be his own, although, as they themselves afterwards show, defendant was only sheltering Frank's from the reach of creditors. He had been but little over a year in business, and excuses non-payment of weekly instalments on his debts, by saying it took all he could make to pay expenses. A comparative stranger, who could know what he had or owed? With no established reputation, is it strange that such conduct as his should have led to the belief which would prompt creditors to avail themselves of the most summary law allowed them against him?

But, though his creditors may have misconstrued his conduct, he nevertheless did what by the law subjected his property to attachment, of which the record shows sufficient legal evidence, if our construction of the statute is correct, and he is not therefore entitled to have the attachment dissolved.

C. W. Jones, for Appellee.

The questions presented for the determination of the court in these cases are identical in every respect. The suits were commenced by attachment under the law of 1859, and the grounds for the attachment are: "That defendant is removing his property beyond the limits of the State of Florida." The defendant traversed this allegation in the plaintiff's affidavit; a jury was empanelled to try the issue thus made, when, after hearing the evidence and the charge of the court, found for the defendant, and the judgment of the court was, in all these cases, "that the attachments be dissolved." A motion was then made *pro forma* for a new trial upon the grounds stated in the record, which was refused by the court, and thereupon the plaintiffs appealed to this court.

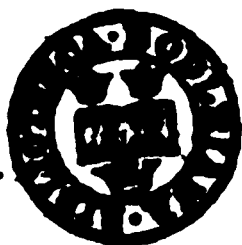
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The principal ground upon which the counsel for the appellant insist that the judgment should be traversed is, that the court erred in its construction of the law of 1859, in accordance with which these suits were instituted.

It is insisted that, under this law, it matters not what may be the character of the removal of property as to its value or the intent which prompted its transmutation; if the debtor is in the act of removing any property to an adjoining State, an attachment will lie against his estate, no matter how honest may be his purpose, or how much he left behind as security for his creditor. That the law prescribes the ground which must exist before an attachment issues, and that as the law does not require any bad intention to be charged in the affidavit in this case, or require the plaintiff to state negatively that the defendant has left no property in this State as sufficient security for his creditor, that then these matters could not properly enter into legal consideration in determining the issue, "whether the defendant was removing his property or not." That as the judge left it to the jury, under all the circumstances as they appeared in evidence, to say whether or not *this removal* was intended to affect the creditor in any way injuriously, that he erred, and should have charged that any removal of property on the part of the defendant to another State, without regard to intent, quantity or circumstances, authorized the attachment. This is the law as insisted upon by counsel for the appellants, and the denial of which is assigned as error.

The law as found in the statute book is, that in case where oath is made that the party defendant is *actually removing* his property beyond the limits of the State, an attachment shall issue, &c., &c.

Now can it be seriously insisted that these words in the Act of 1859 must be taken without any limitation whatever? Will any removal of property, however insignificant, casual, or honest, come within the meaning of the law? If it be admitted that there must be some reasonable limitation to the words of



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this act, then there is an end to the controversy; for, if the law admits of any construction at all, the construction of the court below is the only one that could well be given to it. Would the law in question apply to the removal of merchandise out of State in the regular course of trade? To the shipment of articles manufactured here for a market abroad, and where alone such articles would command any reasonable price? Would it be held to apply to the casual *removing* of the horses and carriage of a citizen upon a visit to a neighboring State?

If, as insisted upon by counsel, it is not competent to look to the intention of the party or character of the removal, then, in all these cases that I have mentioned, an attachment might be sued out, notwithstanding the defendant had more than sufficient property within the State to secure his creditor.

Was this law *intended* to create such great hardships as would arise in such cases, by not *allowing* the defendant under any circumstances to show, in defense, the character of the removal?

In this case the defense is, that defendant was removing the property in the course of trade, and not with the view or intent of injuring his creditors. The proof satisfied the jury that such was the fact; that he had \$12,000 worth of goods behind unremoved, and that the removal of the three cases of merchandise to Alabama was in consequence of the extreme dullness of trade in Pensacola.

If the court was right in leaving the matter of the defendant's intention to the jury, in regard to this removal, as we insist it was, then there can be no questions made as to the right of the jury to find as they did in this case. If the court below took the correct view of the law, it was eminently proper for the jury to be informed by legal evidence of the entire character of this removal of property—the amount actually being removed, the estate which the defendant had in Florida not being removed, the object of the party in carrying off the goods, as expressed at the time or derived from circumstances. These

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matters were allowed to be given in evidence, as shown by the bill of exceptions. The jury having the whole subject before them, under the charge of the court, concluded that this removal of property did not in any way affect the security of the creditor, and they dissolved the attachment.

“The principle upon which the statute proceeds is *the danger of loss* of the debt by the removal of the defendant’s property.” When the reason of the law ceases, the law itself should cease.

I shall endeavor to support the views of this brief by the highest judicial authority.

In Louisiana, under a statute authorizing an attachment where the debtor is about to remove his property out of the State before his debt becomes due, it was decided that the statute must be understood to apply to property which the creditor might have supposed would not be carried out of the State, and to which he might have looked for his security at the time of contracting or since; but that he would be unreasonable to extend it to a *species of property*, which from its *nature* and destination, must necessarily be taken out of the State, and which the creditor could not have believed would remain continually within it.

Therefore, where a debtor was the owner of a steamboat, which he had purchased from the plaintiff, and for part of the purchase money had given his notes, which were not due, it was held that the fact of the defendant being about to remove the boat out of the State in course of regular trade, *without any fraud or intention to defraud being alleged*, was not sufficient to justify an attachment on the ground stated. Russell vs. Wilson, 18 Louisiana, 367. See Drake on Attachments, 3d edition, side page, 69.

The court will observe that the law of Louisiana above cited, like our own statute under consideration, is silent as to *fraud* or *intention* to defraud on the part of the debtor, and yet the court held, that unless something of this kind was alleged or shown by the creditor, that the attachment could not be maintained or upheld.

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In Illinois, where the statute authorized an attachment when the debtor "is about to remove his property out of the State to the injury of his creditor," an attachment was obtained on that ground against two debtors, and levied upon a quantity of pig-iron, which was all the personal property owned by the defendants in the county at the time the writ was issued. The defendants traversed the allegation of the plaintiff's affidavit. On the trial, one of the defendants offered to prove that he owned a large amount of personal property, free from incumbrance, within the State, and which was more than sufficient to discharge the plaintiff's demand. The court below excluded this evidence, but the Supreme Court held this to be error, and that the evidence was admissible. *White vs. Wilson*, 10 Illinois, (5 Gilmore.) Page 21, *Ridgeway vs. Smith*; 17 *ibid.*, 33.

But the case which is most analogous to that now before the court is the case of *Montague vs. Gaddis*, 7 Mississippi Rep'ts, 453. In this case, the language of the statute appeared to be in the exact words of our own law. There an attachment was obtained on the ground that the defendant was "about to remove his property out of the State." The defendant plead in abatement, denying the allegation in the affidavit. On the trial under this plea it appeared that the defendant, in pursuance of a previously explained purpose, had removed a part of his property to Louisiana, but that at the time of the attachment he had, in Mississippi, real and personal property more than sufficient to pay his debts. The court held that the attachment would not lie, and used the following language in stating the grounds of its decision:

"The object of the statute is to secure to the creditor security for his debt, in case the debtor is about to remove his property out of the State, to deprive the creditor of the collection of his debt in this State. The principle upon which the statute proceeds, adds the court, is the danger of loss of the debt by the removal of the defendant's property, and this reason fails, and the remedy provided by the statute plainly does not apply,

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when the debtor is *removing* a part of his property, but does not remove or intend to remove another part of it, subject to the payment of the debt, amply sufficient to satisfy it and accessible to the creditor's execution, and such portion of his property remains in his possession openly subject to execution. For when property to such an amount, and so situated, remains in the possession of the debtor, and is not about to be removed from the State, it could not be justly said that the creditor's debt would be in danger of being lost by the removal of another part of the debtor's property from the State." See Drake on Attachments, 3d edition, side page 70.

So in a case which arose in the State of Tennessee, where the law allowed an attachment where a debtor "is removing or about to remove himself or his property beyond the limits of the State." An attachment was obtained against the owner of a steamboat, on the ground that he was about to remove the said steamboat beyond the limits of the State. "The court intimated that the designation of only a particular piece of property is about to be removed, if it stood *alone*, would not be sufficient to authorize an attachment; and that the affidavit should exclude the idea that other property might still be left by the defendant within the jurisdiction amply sufficient to satisfy the demand. But as the attachment was applied on the ground that the court regarded the allegation in the affidavit as equivalent to the assertion that the defendant was about to remove himself." Rungum vs. Morgan, 7 Humphreys, 210.

I think these authorities undoubtedly settle the point in favor of the appellee, that the words "removing his property beyond the limits of the State" are not to be taken without any limitation whatever.

I therefore insist that there is no error in the admission of the testimony of Nassitts and Frank, which went to show the amount of property removed or being removed, and the amount of property which the appellee had within the State. That the charge of the court leaving it to the jury to say whether, under all the

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circumstances, the removal of the goods in question was intended or did affect the security of the creditor, is also free from error. These are the only two questions which can reasonably enter into the consideration of the court in this case.

The objection that the verdict is against the weight of evidence, is without foundation. There is nothing in the record to show that anything stated by Nassitts and Frank was untrue. There is not the least discrepancy between their testimony and that of the witnesses for the plaintiffs in attachment. It was clearly proven that *only* three of the boxes of merchandise seized by the sheriff belonged to the defendant, and that the remainder belonged to the witness Frank. It has been attempted to destroy the effect of this testimony by inference of fraud, and an attempt to show all the goods belonged to the defendant Nassitts. This conclusion is drawn from the tardiness of Frank in coming forth and claiming his part of the goods after they were seized by the sheriff as the property of Nassitts. The sheriff, however, became satisfied that the goods contained in twelve boxes belonging to Frank, and they were restored to him, and the defendant Nassitts voluntarily supplied the deficiency in the levy, by giving the officer, out of his stock in store, other goods in their place and of equal value. The jury understood very well the apparent tardiness of Frank—his putting the goods in Nassitts's store when they were first purchased, and all his subsequent conduct. They understood very well, that every thing that appeared in evidence, in regard to the ownership of the boxes, was perfectly consistent with the right of property in them set up by Frank. To them belonged the duty of weighing the evidence, and while in ordinary cases it would appear difficult to reconcile the right of property in these goods as set by Frank, with their intermixture with the goods of Nassitts yet they *knew* that Frank *had* an object to accomplish in all this and *that* was to keep *these* goods from being exposed to *own creditors*. This is the key and secret of all the mysterious conduct of Frank in reference to these goods. That the tr

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boxes belonged to him, and three boxes to Nassitts, there can be no doubt. Nassitts had no concealment to make. His stock in trade in Pensacola, valued at \$12,000, was in his own name and open to his creditors. Why should he seek to make it appear that the goods contained in the twelve boxes belonged to Frank and not to himself, if they really did not? The sworn testimony of the party owning the goods is in the record. Had not the jury the right to accept the positive sworn testimony of the witness in preference to the presumption of fraud, drawn from doubtful circumstances, as insisted by the counsel for appellants?

WESTCOTT, J., delivered the opinion of the court.

This was an action of assumpsit. An attachment was issued therein based upon an affidavit assigning as cause that the defendant "was acutally removing his property out of the State of Florida."

The defendant, seeking a dissolution of the attachment, tenders an oath to the court putting in issue the "special cause assigned," and thereupon moves a dissolution. Evidence is heard upon the issue thus presented. The plaintiff requests the court to charge the jury thus:

First. "If the jury believe the defendant was removing his property beyond the limits of the State they must find for the plaintiff."

Second. "If the jury believe that the defendant was removing any portion of his property beyond the limits of the State they must find for the plaintiff."

Which was refused, and the jury instructed as follows:

"If in this case you believe, from the testimony, that the defendant at the time of suing out the attachment was removing his property out of the State of Florida, you should find for the plaintiff, unless you are further satisfied that it was not done with the intent of avoiding the payment of his debts. It will

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is sufficient on this issue for the plaintiffs to prove that the defendant was removing his property out of the State, and it will be incumbent on the defendant to show the fairness of the transaction, unless it should appear from the testimony adduced against him. It will be competent for you to consider all the facts proved before you in determining as to the intent of the defendant in the transaction, and if you believe that it was to avoid the payment of his debts you should find for the plaintiffs. It is not necessary that the testimony satisfies you that he was removing any of them out of the State with such intent, you should find for the plaintiffs, for the plaintiffs would not be required in such a state of circumstances to wait until all the goods were removed or being removed." The rest of the charge relates to the weight to be given to "circumstantial testimony," and it is unnecessary to repeat it, as no exception is urged that portion of the charge. To the refusal of the court to give the instructions prayed, as well as to the instructions given, plaintiffs by their counsel excepted. Upon a verdict for defendant there is a motion by plaintiffs for a new trial on the following grounds:

First. The verdict of the jury was against the legal evidence in the case.

Second. The court erred in admitting evidence not pertinent to the issue, and calculated to mislead the jury.

Third. The court erred in admitting evidence of the defendant on other points than that of removal of property, viz., as to whether his intention by such removal was to defraud his creditors or defeat them in the collection of their debts.

Fourth. That the court erred in the instructions given, and in refusing the instructions asked by the plaintiffs' counsel.

This motion is overruled, the attachment is dissolved, and entry of a judgment for the defendant is ordered.

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prayed and allowed, and the appeal being now here for a hearing, we have an assignment of errors as follows:

First. That the court below erred in permitting evidence to go to the jury to show the intent with which the defendant was removing his property.

Second. In permitting evidence to show the value of property retained by defendant in the State.

Third. In its instructions to the jury, in so far as these authorized the jury to decide upon the intent of the defendant in removing his property, and upon the fairness of the transaction.

Fourth. In refusing the two instructions asked for by plaintiff's counsel.

Fifth. In overruling the plaintiff's motion for a new trial.

This is a very important case, and it has received much thought and consideration. The first conclusion which our minds have reached with confidence is that it cannot go off upon any literal and absolute construction of the terms "actually removing his property beyond the State," as is insisted by appellant. The words are, "actually removing his property," and upon the face of the statute these words do not plainly and absolutely negative the idea that an actual removing of the *whole* of his property is not intended rather than the actual removing of a *part* of his property, or *vice versa*, or that both and either is not embraced in the terms used.

The plain result from the context is that at the threshold we are met with many inquiries. For instance: Does the statute intend a removal of a *part* of the property of the defendant? Does it mean a removal of the whole of his property? Does it embrace both? Does it embrace a removal with an intention to return? Is the removal intended only a permanent removal, or does it as well include a removal *animo revertendi*—such a removal as attends a mere visit to a neighbor across the State line, in which the carriage and horses of the defendant pass the line, and in which his intention is to return, perhaps in a day, with his property. Is the property here meant every species

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of property? Does it embrace a steamboat which at the time the debt was contracted was engaged in the usual business of trips beyond the State, and when the defendant has done nothing to impair the debt, and everything is in the same condition it was when the debt was contracted? Does it embrace a bill of exchange purchased by a local merchant and transmitted by mail to his agent in New York or Charleston with directions to collect and apply to his indebtedness at that point? If so, this is a removal of property beyond the State never to return, and the creditor, assuming that only a part of his debt was paid, could take out an attachment against his debtor for doing nothing more in fact than paying a part of this identical debt.

We do not propose to determine these questions only so far as they are involved in this case, and they are here stated only to show that it will not do to say that these words express plainly and absolutely what shall constitute a removal or what is indicated either in amount or character by the words "*his property*." While the able counsel for appellants agree that it is not every removal that is within the meaning and spirit of the act, and is willing to let the ordinary rules controlling the construction of statutes operate to give this term definition, yet these same principles cannot, it is insisted, be invoked in the dilemma presented by the statute on its face in the use of the terms "*his property*" in the connection in which they stand, and the argument is that these terms include all and every species of property irrespective of amount or character, and independent of the general intent of the statute; that such is the literal construction, and that such is the only construction which can be given consistent with what is claimed to be the manifest legislative policy of the State.

A brief inquiry into the history of attachment proceedings will enable us to ascertain with more certainty what is the general purpose, intent, spirit, and effect of these statutes.

No such process was known at common law, and the proceeding is traced to a custom of London whereby "if a plaintiff was

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affirmed and was returned *nihil*," the plaintiff had a garnishment against debtors of the defendant, and after certain proceedings was entitled to judgment. Under these proceedings, without personal service upon the defendant, debts due the defendant which were not subject that could be reached by a *fi. fa.* at law, were subjected to his claim. In this and most of the other States, while the remedy extends to subjecting debts due the defendant by process of garnishment as under the custom, it is more comprehensive, extending not only to such sums as may be due the defendant, but making equally subject to its grasp the entire real and personal estate of the defendant, except in so far as local exemptions may protect it, with the additional difference, too that here there must be either actual or constructive service of the defendant before judgment.

It is a special proceeding at law in the nature of a proceeding *in rem*, giving an extraordinary remedy to the creditor when the debtor is guilty of any act which manifests fraudulent intent, or has a tendency to impair the debt, or to postpone or delay proceedings at law for its collection, or when on account of non-residence or other enumerated causes, personal service of process cannot be accomplished; thus in effect making the property of the debtor the means through which not only notice is often given of the suit, but by which ultimately, through the instrumentality of a judgment, the claim is satisfied. These particular facts or causes are as various as the views of the Legislatures of the several States, and are such as the different interests of commercial or agricultural communities may, in the judgment of those who make laws for them, require. There is one thing, however, which may be said of this legislation, and which is true of every statute as interpreted by the judiciary, which is, that when there is no concurring fact which operates to delay or endanger the debt, or impair the means of its payment, by decreasing the amount of property within the jurisdiction, or some such like thing, *the simple fact that the debt is due is never held sufficient.* Take the fact of non-resi-

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dence. Here the debtor is beyond the jurisdiction, while his property is within the jurisdiction of the creditor, and we have combined two facts: first, the debt is due; second, there is no remedy within the jurisdiction where there is property. Service cannot be perfected at law, except through this *quasi* proceeding *in rem*. These facts otherwise operating to postpone the collection of the debt and to send the creditor to the jurisdiction of the debtor, unless he has a lien which can be enforced in equity, the remedy by attachment at law is given generally against non-resident debtors. It is for reasons very like unto those above stated, that a remedy is given where the party is about to remove out of the State, because the natural result of such an act, under ordinary circumstances, is to place the creditor in a position differing from that which he occupied when the debt was contracted—such a position as hinders its collection, or otherwise operates to the detriment of the creditor on account of a threatened removal of the debtor's person beyond the jurisdiction.

To give the terms "removing his property out of the State" a strictly literal construction, independent of the intent as well as of the effect of the removal proven in each case, would be inconsistent with the principles which have obtained in the construction of similar statutes in other States.

To admit that the statute covers a case where there is no bad intent, where there is perfect fairness, and where the amount of the property being removed, in comparison with what is left behind, is very small, and the debtor is entirely solvent, and the removal is in the ordinary course of trade, is to change entirely the character of the statute. It is a remedial statute, and it should be so construed as to correct the evils which brought it into existence, and not to create a greater evil by interdicting every species of legitimate trade beyond the confines of State jurisdiction, under the penalty of giving every creditor an absolute lien, with a swift and sure remedy for its enforcement, against a debtor guilty of no act either wrong in intent or prejudicial in

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effect. Such a construction as this would result in the imposition of a penalty rather than give a remedy for a wrong, that penalty being the creation, by legal process, of a lien upon the property of the debtor in favor of the creditor, for an act which is attended by the utmost fairness, and which does not impair the security or delay the remedy of the creditor. This would be to make the law rather a penal than a remedial statute, and while operating to give some additional security to the creditor, its essential characteristic would be the creation of a lien as a penalty.

Such construction ought to be put upon a statute as best answers the intention the makers had in view, and that intention is to be collected from the cause or necessity of making it. Can it be said that the results of acts that could in no reasonable degree impair the remedy or security of the creditor was the cause of this statute? Is the necessity which gave origin to it a necessity for giving every creditor a lien upon the property of his debtor? for such *pro tanto* must have been the view of the Legislature if you permit the lien to be created in the absence of any act which changes the relation of parties, or impairs securities, or manifests unfairness, or delays remedies. A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, (Plowden, 366) and a thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers. Plow., 18.

The construction of no other statute has afforded more ample illustration of the propriety and necessity for these two principles of construction than the attachment law. In Virginia, for instance, where the act authorizes an attachment "against a person who is not a resident of the State," we have this case: W., living in Virginia, having determined to remove to another State, leaves the place where he has resided, and departs for the place where he intends to reside. He is held to be a non-resident of the State when he commences his removal, and before

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he gets beyond the limits of the State of Virginia, within the meaning of the attachment law. 12 Gratt., 440. Other cases illustrating this principle are 15 Missouri, 657; 5 Conn., 117; 20 Penn., 144.

As illustrating the application of the second principle of construction we have two cases in point—one in Louisiana and the other in Mississippi; the last being a case in which the terms “removing his property out of the State” were defined and construed. The statute in Louisiana authorized an attachment where “the debtor is about to remove his property out of the State before the debt becomes due.” It was held that the fact that the defendant was about to remove a steamboat, his property, out of the State, engaged in her regular trips, was not sufficient where there was no fraud or intended fraud. 18 La., 367. This act was certainly within the letter of the statute, and it was as clearly not within its true meaning or intent. It did not come within the mischiefs for which the statute intended to provide a remedy.

In Mississippi an attachment was sued out, and the ground assigned was that the defendant “was about to remove his property out of the State.” “It appeared that the defendant, in pursuance of a previously expressed purpose, had removed a part of his property to Louisiana, but that at the time of the attachment he had in Mississippi real and personal property more than sufficient to pay all his liabilities in that State, which he did not remove or intend to remove.” The attachment was dissolved, and the court say: “The object of the statute is to afford to the creditor a security for his debt in case the debtor is about to remove his property out of the State so as to deprive the creditor of the collection of his debt in this state. The principle upon which the statute proceeds is the *danger of the loss of the debt by the removal of the defendant's property*, and this reason fails and the remedy provided by the statute plainly does not apply where the debtor is removing a part of his property but does not remove or intend to remove another part of

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it, subject to the payment of the debt, amply sufficient to satisfy it, and accessible to the creditor's execution. For when property to such an amount and so situated remains in the possession of the debtor, and is not about to be removed from the State, it could not be justly said that the creditor's debt would be in danger of being lost by the removal of another part of the debtor's property from the State." 37 Mississippi, 457; 7 Humph., 210.

While these attachment statutes are almost as various as there are States in number, it will be noted as a general rule that there is great unanimity in the judicial construction of like provisions in them, and that the strict letter of the statute is, as a general rule, made to yield to its general purpose and intent, which purpose is nowhere held or intimated to be to give a creditor a lien because his debt is due, and to subject the debtor to the penalty of having a present incumbrance upon his estate simply because his debt is due and he permits it to remain unpaid. This is the result of the doctrine urged by appellants when submitted to the test of close analysis. The able counsel for the appellants in this case admit that the case in Mississippi is in conflict with their view that "*the only questions are, Is it his property, and is he actually removing it out of the State?*" but it is insisted that while that case may be good authority under the Mississippi statute, it cannot be so here, because "the statute policy" of Mississippi is different from the statute policy of Florida. Is this correct? The attachment law of 1845 in this State gave the remedy when the debt was actually due and the party from whom it was due was actually removing out of the State, or resided beyond the limits thereof, or absconded or concealed himself so that the ordinary process of law could not be served upon him, or was removing his property beyond the limits of the State, or secreting or fraudulently disposing of the same for the purpose of avoiding the payment of his just debts.

The present law gives the remedy when the debt or sum demanded is actually due, and upon affidavit that the party has

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reason to believe that the person from whom it is due will fraudulently part with his, her, or their property before judgment can be recovered against him, her, or them, or is actually removing his, her, or their property out of the State of Florida, or about to remove it out of the State, or resides beyond the limits thereof, or is actually removing or about to remove out of the State, or absconds or conceals himself or herself, or is secreting his or her property or fraudulently disposing of the same.

It is thus seen that in the new statute the words "so that the ordinary process of law cannot be served upon him," are omitted after the words "absconds or conceals himself," and the words "for the purpose of avoiding the payment of his just debts" are omitted from the last clause of the old statute.

The purpose of the Legislature in the first omission was simply to dispense with any inquiry as to whether a party who had absconded or concealed himself had so absconded that the ordinary process of law could not be served, and its purpose in the last omission was simply to obviate the necessity of proving that the sole purpose of a party who was removing his property from the State, or secreting or fraudulently disposing of it, was to avoid the payment of his just debts. That is to say, when it was established that the party was actually removing his property out of the State, under the old statute was necessary to go further, and to allege and prove its purpose to be to avoid the payment of just debts; while under the new statute, whatever might be its purpose, if the removal endangered the debt of the creditor, or was made with wrong intent it was such a removal as came within the statute, and to that extent was the remedy of the creditor extended. Besides, the Legislature, no doubt, conceived that proof that the purpose of a *fraudulent disposition of property* was to avoid the payment of a just debt was unnecessary, as it would be difficult to establish a *fraudulent disposition* when the purpose was to *accomplish* the payment of a just debt; that is to say, the last clause in the old law, so far as the secreting and fraudule

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position of property was concerned, was entirely useless and improper. It is doubted whether those terms in the old statute qualified the words "removing his property beyond the limits of the State;" indeed, a correct construction of the sentence makes them qualify and limit only the terms "secreting or fraudulently disposing of the same;" but this is immaterial, as in either event the conclusion reached by appellants is not the legitimate result or effect of the modification.

How is it with the statutes of Mississippi?

They provided for an attachment upon the ground of a removal of property out of the State by the debtor, and in addition to this there was a special clause in the law requiring that the "act should be construed in all courts of judicature in the most liberal manner for the detection of fraud, the advancement of justice, *and the benefit of creditors*," and a careful examination of the attachment statutes of that State will show a "statute policy" certainly not behind this State in manifesting an intent and purpose to advance the interest of the creditor, and to secure to him remedies in all cases where there is any danger to his debt.

We are clearly of the opinion that the giving of such a construction to the statute as appellants contend for, would be inconsistent with every adjudicated case which reaches the question, as well as opposed to the manifest spirit, purpose, and intent of the statute.

Having thus taken a general view of the statute, it only remains to apply these principles to the special matter of this case.

It appears that one Simon H. Frank, the agent of a person living in Michigan, and the defendant, were doing business as merchants in Pensacola, both occupying the same store, the daily sales of the goods of Frank being returned to him "every night," each of the parties selling the goods of the other as called for.

During a temporary absence of the defendant in an adjoin-

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ing county, Frank packed up his portion of the goods and removed them from the common store-house with the intention of removing them to Pollard, Alabama. Subsequently, as Frank's stock was incomplete, he proposed to the defendant that he should add some of his goods and complete the assortment of stock, which proposition defendant agreed to, and three boxes of his goods, amounting in value to six hundred dollars, were added, with the understanding that they were to be sent to Pollard, Alabama, and that the parties were to share the profits. These goods, while being removed out of the State, are attached by the plaintiff. It is in proof that the defendant was indebted in New York three or four thousand dollars, and that when the attachment was levied he had in his store in Pensacola from eight to ten thousand dollars worth of goods, and that there was due and owing him about two thousand dollars in Pensacola.

On the other hand, it is also in evidence that about three weeks before the attachment defendant promised Albert Hyer that he would provide for the payment of certain notes held by him by making deposits of his daily sales with him, and that about this period "there were auction sales at his store on two or three night," and on one occasion in the day time. The amount of goods thus sold does not appear. There were payments amounting to two hundred and fifty dollars made to Hyer by defendant, which were directed to be applied to rent account, and the defendant in his testimony states that the balance went to pay necessary daily expenses.

It is clear from what has been stated in the foregoing portion of this opinion, that the instructions asked for by plaintiff were properly refused. It is not seen how any state of facts would justify them. Any removal of goods or property, however small in amount or whatever is their character, which is made with the intent of avoiding the payments of debts, is within the mischief which it was the purpose of the statute to correct, and accepting the facts as they appear in testimony in this case, the

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instruction of the court covering this point, as well as submitting the question of the fairness of the transaction under all the circumstances to the jury, was entirely proper. What has been said disposes of the first, third, and fourth errors assigned, and the second and fifth remain to be considered.

The second is that the court erred in permitting the introduction of evidence to show the value of the property retained by the defendant in this State.

There is no error here. Indeed, did it not appear to this court from a general review of this case that the jury had passed upon this fact, and had found that the amount of property being removed was very small, and that the property remaining in the jurisdiction was amply sufficient to more than satisfy the debt, and in their judgment there was no danger of loss of the debt by the removal, we would be inclined to direct a new trial; for it is the opinion of the court that in such a case as this, if the property remaining is not amply sufficient under all the circumstances of the case, then it is such removal as is within the statute, and this, too, independent of any question of intent. There must be no doubt of the solvency of the party.

Any other view would permit the debtor to remove all of his property beyond the jurisdiction, in the event he proved it was his purpose to remove it to a point where it could be made more available for the purpose of paying his debt, which cannot be.

The fifth assignment is that the court erred in overruling the motion for a new trial. The grounds for this motion are set out in the preceding portion of this opinion. What has been said disposes of all the grounds upon which this motion was based except the first, which is that the verdict of the jury was against the legal evidence.

All of the evidence admitted was proper, and while the facts appearing in the testimony are of such character as to create doubt as to the intent and purpose of defendant in this removal

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of goods, yet this question being passed upon by the jury, such a case is not presented by this record as would justify this court in directing the verdict to be set aside.

It would have been proper in this case for the court to have extended its charge to other points than that of intent which were properly raised by the testimony, thus, for instance, the point as to the danger of loss of the debt by the removal, independent of the question of intent; such a charge being applicable to that evidence which related to the amount of goods being removed, the amount retained, and the solvency of the party. It is not perceived, however, that the omission to charge upon those facts resulted to the prejudice of the appellant. Besides, while it is true that if the court assumes to charge at all, it ought to charge on the whole law, yet it is settled that a party cannot, upon error, avail himself of any omission in this respect, unless he has called the matter to the attention of the court below by a prayer for an instruction covering the point. 9 Fla., 176; 2 Pet., 15.

The judgment is affirmed.

HART, J., dissented, and delivered the following opinion.

This is an action of assumpsit under our attachment law.

The affidavit was made under the statute approved December 20th, 1859, which provides: "That from and after the passage of this act, (the) writ of attachment now authorized by (the) statutes of this State to be issued where the debt or demand is due, shall in no case be issued unless the party applying for the same, or his agent or attorney, shall first make oath in writing before a justice of the peace or clerk of the circuit court, as is now provided by law, that the amount of the debt or sum demanded is actually due, and also that he or she has reason to believe the party from whom it is due will fraudulently part with his, her, or their property before judgment can be recovered against him, her, or them, (as the case may be,) or is

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actually removing his, her, or their property out of the State of Florida, or about to remove it out of the State, or resides beyond the limits thereof, or is actually removing or about to remove out of the State, or absconds or conceals himself or herself, or is secreting his or her property, or fraudulently disposing of the same,” and alleges that Nassitts is justly indebted to Haber & Co. in the sum of four hundred and four dollars and eighty-eight cents, which amount is actually due, and that the said William W. Nassitts is actually removing his property out of the State of Florida. The attachment bond was made, approved, and filed, and the writ was issued and executed by attaching fifteen boxes of assorted merchandise pointed out as the property of Nassitts, and by notifying Nassitts. The plaintiffs then filed their declaration, and afterwards the defendant filed two affidavits for dissolution of the attachment. The statute providing for dissolving attachments is as follows: “The courts respectively to which such attachments are returnable shall be always open for the purpose of hearing and deciding motions for dissolving such attachments, and in any such case, upon oath made and tendered to the court that the allegations in the plaintiff’s affidavit are untrue, either as to the debt or sum demanded, or as to the special cause assigned, whatever it may be, for granting the attachment, then in every such case it shall be the duty of the court to hear evidence upon the issue so presented; and if, in the opinion of the court, the allegations in the plaintiff’s affidavit are not sustained and proved to be true, the said attachment shall be dissolved. *Provided*, That if the party, defendant, shall demand the same, a jury shall be empannelled to try the issue joined as aforesaid.” T. D. The affidavits of the defendant Nassitts alleged that “the allegations in the plaintiffs’ affidavit as to the special cause assigned for the issuance of said attachment are untrue; that said defendant was not removing his property beyond the limits of the State of Florida as alleged in the said affidavit, but was only forwarding a few of his goods for sale in an adjoining State in the course of his

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trade.” Thereupon a jury was empannelled, evidence taken, the jury rendered a verdict for the defendant, and the court gave judgment dissolving the attachment. The bill of exceptions gives the evidence, the rulings of the court, and its charge to the jury.

It is not necessary for the purposes of this opinion to state the evidence in detail. The court, against the objections of the plaintiffs, admitted evidence of the *purpose or intent* of the defendant in removing his property, which was the only question raised in the case, and charged the jury as follows: “If in this case you believe from the testimony that the defendant at the time of suing out the attachment was removing his property out of the State of Florida, you should find for the plaintiff unless you are further satisfied that it was not done with the intent of avoiding the payments of his debts. It will be sufficient on this issue for the plaintiffs to prove that the defendant was removing his property out of the State, but it will be incumbent on the defendant to show the fairness of the transaction, unless it should appear from the testimony adduce against him. It will be competent for you to consider all the facts proved before determining as to the intent of the defendant in the transaction, and if you believe that it was to avoid the payment of his debts, you should find for the plaintiffs. It is not necessary that the defendant should have been removing all his goods, but if the testimony satisfies you that he was moving any of them out of the State with such intent, you should find for the plaintiffs, for the plaintiffs would not be required in such a state of circumstances to wait until all goods were removed or being removed. You should rely rather on the intent of the party than the proportion the goods in question bear to the whole amount of the defendant’s goods. It is competent for you to consider circumstantial testimony. It should be received with caution, but it is admissible, if the facts have been such, and may rise so high in the scale of testimony as to generate full conviction. Its sufficiency consists

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capacity to satisfy the conscience and understanding of the jury. You will give to such testimony in this case the effect to which you think it entitled. If there is any discrepancy between the statements of the witnesses you should reconcile them if you can, but if you cannot do so you must decide for yourselves which you will believe, for you are the exclusive judges of the credibility of the witnesses.”

The plaintiffs requested the court to charge the jury as follows:

First. If the jury believe the defendant was removing his property beyond the limits of the State they must find for the plaintiffs on this motion.

Second. If the jury believe the defendant was removing any portion of his property beyond the limits of the State they must find for the plaintiff on this motion. Which the court refused to do.

After verdict, the plaintiffs moved for a new trial on the following grounds:

First. The verdict of the jury was against the legal evidence in the case.

Second. The court erred in admitting evidence not pertinent to the issue and calculated to mislead the jury.

Third. The court erred in admitting evidence of the intention of the defendant on other points than that of removal of the property, viz.: as to whether his intention by such removal was to defraud his creditors or defeat them in the collection of their debts.

Fourth. That the court erred in the instructions given to the jury, and in refusing the instructions asked by plaintiffs' counsel.

The motion was overruled, and as by the judgment of the court the amendment was dissolved, the plaintiffs took their appeal.

The defendant proved good intention on his part, and under

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the rulings and charge, the jury had no alternative but to find the verdict for him. The issues required by that part of the act of 1859 which these plaintiffs invoked, and by the act for dissolving attachments, taken together, are only “as to the debt or sum demanded, and as to the special cause assigned.” The latter is the point in this case, and it was correctly assigned. Does the statute authorize a departure from it, a side issue, a collateral question as to intent to be raised, by which the plaintiffs may be divested of their lien obtained by complying fully with all of its several stringent requirements? I think not. The statute provides for cases in which creditors are about to be deprived of their lawful rights by acts accompanied by fraudulent intent, and also for some cases in which they may be deprived of them without such intent, and, indeed, with the very best of intentions. There is no room for construing the latter to mean the same as the former. The case of a non-resident, for example.

The affidavit of the defendant denied the truth of the special cause assigned in the plaintiffs’ affidavit, and in the same sentence plainly showed that it was true, but that he, the defendant, had good intentions. This is made no issue as to “the special cause assigned” as authorized by the statute, but suggested another issue not provided for in such case. He had not complied with the requirements of the statute for dissolving attachments, and had no cause in which to make a motion to dissolve. This he seemed to see, for twelve days afterwards, at said term, he filed his second affidavit, simply alleging that “the special cause assigned for the issuance of said attachment is untrue, and that said attachment ought to be dissolved.” Under the statute, the “oath made and tendered to the court” by the defendant, must be not only “that the allegations in the plaintiffs’ affidavit are untrue,” but it must go farther, and allege, not mere matter of law, as that the attachment ought to be dissolved, but that it is “untrue either as to the debt or sum demanded, or as to the special cause assigned, whatever that

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may be.” Either as to the debt, as, for example, that it is not due, or as to the sum demanded, as, for example, that it does not amount to that sum, or as to the special cause assigned, as, for example, that he is not actually removing his property out of the State, but only to some other part of the State. At all events, the “issue” to be “presented” must be confined “to the debt or sum demanded, or the special cause assigned,” and no other debt or sum or special cause except that which is “assigned” “in the plaintiff’s affidavit” will answer. The first affidavit, still on file and constituting a part of the record of the cause, plainly showing the special cause assigned in the plaintiffs’ affidavit to be true, the court should have refused to consider this second affidavit, and should have overruled the motion. For if the causes assigned were all true, there could be no room for dissolving the attachment.

In cases like this, where there are no pleadings but the affidavits, and no issues but what they contain, if the affidavits go outside of the law to present facts and issues not provided for by the statute, it is the duty of the court in its charge to the jury, or, if a jury has not been demanded, in its rulings to treat all such collateral allegations as nullities, and to prevent them from influencing the verdict or decision; hence, if the court rules otherwise, and no exception to that ruling appears to have been taken or noted at the moment, but that a charge embodying the law correctly was requested to be given to the jury and was refused, and that the point was again made upon motion for a new trial and overruled, and that that last ruling was excepted to and assigned upon appeal as error, the rule requiring facts not otherwise of record to be embodied in the bill of exceptions is not infringed. It does not appear that these affidavits of the defendant were objected to otherwise than substantially in instructions asked to be given by the court to the jury, which were refused, and in a motion for new trial, which was overruled, and in the assignment of errors; but as no other course is wholly practicable under these statutes

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in such cases, that pursued must be held to be sufficient to enable this court to act upon errors in the said affidavits.

The defendant in his first affidavit had voluntarily estopped himself from making any issue of fact "as to the special cause assigned in the plaintiffs' affidavit," by thus clearly showing of record that the special cause assigned in the plaintiffs' affidavit was true in point of fact; but he was seeking to present some other special cause, or some explanation of that which was assigned. He was not seeking to meet the issue required in the statute and "presented in the plaintiff's affidavit," but to evade it by alleging something about his removing only a part of his property, and about his doing it in the course of his trade. There is not the remotest suggestion of any such issue in the few words which the statute authorizes the creditor to use. If the defendant would not in his affidavit join in "the issue tendered in the plaintiffs' affidavit," the statute gave him no right to demand a jury, for there could be no other lawful issue of fact to try.

A jury was empanelled to try something that the creditor was nowhere informed in the statute he would have to meet. He was not required to know that the property being removed and which he attached actually *in transitu* was only a part of the debtor's property, nor that he had any left behind, nor with what purposes or intent the debtor was removing it. How could he *know* the intention, even if told? Thus wholly uninformed of what character of proof the defendant would be allowed to adduce, thrown out into the broad and uncertain field of intentions, of which the part of the statute which he was authorized to invoke, and which he had invoked, had furnished him no notice. he was obliged to come before the court, he *might* suppose to prove what the defendant had already in the record conclusively proven for him, and to disprove whatever the defendant could by testimony urge as to his own intention. He had complied with every requirement of the statute, and knew that he could easily prove all that it required of him, and may very properly

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have felt that he was in danger of losing that suit nor of having costs and damages to pay; he could see in the statutes that the defendant might replevy, in which event he would have a bond and approved sureties in place of the property, but he could not see in the statutes *providing for his case*, that the defendant might destroy his attachment, and subject him to costs and damages, by proving good intentions.

Language cannot be more plain than that of the statute now under consideration: "actually removing his property out of the State." This is all. I can see no sound reason for a construction that cannot be made without at least virtually adding **the words *with fraudulent intent***. That would be to introduce a different question, and one already fully legislated upon and provided for. Arguments drawn from ideas and opinions concerning the legislative and commercial policy and interests of the State, and the abstract rights of debtor and creditor, belong rather to the legislator than to the judge, and have properly no place in judicial opinions or decisions. If the language of a statute is itself doubtful or contrary to common reason there is room for the application of the wise rules of the common law for construing statutes. There is nothing doubtful nor unreasonable in this statute; especially is there no sound reason for construing it so as to add to it something about the *good intention* with which a debtor may carry his property out of the State and lose it. If justice has its losses to trade, commerce, and credit, its compensations far exceed them. If the honest debtor restricts his business operations or his pleasures until he pays his debt, being due, the rewards of his wisdom will be ample.

Counsel for the appellee asks, Can it be seriously insisted that these words in the act must be taken without any limitation whatever? Will any removal of property, however insignificant, casual or honest, come within the meaning of the law? Would the law in question apply to the removal of merchandise out of the State in the regular course of trade, to the shipment of articles manufactured here for a market abroad, and where

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alone such articles would command a reasonable price? Would it be held to apply to a casual removal of the horses and carriage of a citizen upon a visit to a neighboring State? In answer it may be asked, why not? Why should not a delinquent debtor be expected to restrict himself in his business affairs and his pleasures in order to do justice to his creditor and pay his debt, even by sacrifices if necessary? He is in breach of his contract. The debt is due. The creditor may in every respect be as needy as he, indeed may be suffering, and is certainly as much entitled to the *aid of the law*. Ordinarily the commercial creditor desirous of retaining the custom of his debtor does not appeal to the law until he sees danger of the loss of his claim, nor the poorer creditor until compelled by his necessities; and when he sees the very danger which the law recognizes, and invites the attention to, and he invokes its aid, he little suspects that, without any fault on his part, he may *thereby* become involved in still greater difficulties. If the debtor is actually removing his property out of the State, the creditor is not barred of his remedy by his debtor's intentions. They may be good, but the statute places no reliance upon them. The debtor himself cannot rely upon them; every day and hour they may be thwarted with the best intentions, his ship may be sunk or other property lost, and the creditor wholly lose his just claim to the security.

Counsel for the appellants wisely argue that "the debtor cannot justly complain that the arm of the law constrains summary proceedings for obligations he has neglected or failed to meet, and the security for which he is lessening by transfer of property to another State." * * * "Now did not the legislature by its last amendment of the statute manifestly intend to remove all doubt as to the line, fixing it definitely and restrictively upon the simple act of removing the property? To permit a more enlarged scope places the right of the creditor in hopeless confusion and uncertainty. He could never know when the writ was allowed him, and even if the debtor were removing his whole property, if the intent is to enter into the gist of the act there

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might be proof to show 'the fairness of the transaction' which * * * would be fatal to the creditor."

I have stated more than I would but for an intimation that this opinion is not in accordance with the adjudications of eminent jurists of the highest authority in some other States. I well know and fully recognize the danger of doing wrong by departing from the beaten track, and never will fail to yield much to the wisdom of their interpretation of the law. If any of them have decided differently under like statutes and similiar circumstances, nothing but the most solemn convictions of conscientious duty could induce me to depart from the line of interpretation marked out by them. After some search, however, I have not found what appeared to me to be precisely such a case, or one clearly in point, and so do not yet feel obliged to admit the accuracy of the intimation.

After much careful and anxious consideration of the case, and of the rules and principles of law involved in it, fully recognizing, and I trust appreciating, the high qualifications of the learned judge who presided in the circuit court, with cordial respect for his well-known abilities as a jurist, my mind reluctantly concludes that the appeal was well taken, the assignment of errors should be sustained, the judgment of the circuit court reversed, and the cause remanded to that court for correct proceedings.

W. A. Work & Son vs. Henry T. Titus—Statement of Case.

W. A. WORK & SON, PLAINTIFFS IN ERROR, vs. HENRY T. TITUS,
DEFENDANT IN ERROR.

A party suing out an attachment describes himself in the affidavit as agent of the plaintiffs in the action. In executing the bond required under the statute he fails to describe himself as agent of the plaintiffs, "the bond purporting to have been given by him in person," omitting any statement to the effect that he was the agent or attorney, and conditioned to be void if in case the attachment was dissolved the plaintiffs in the suit (naming them) would pay all damages and costs the defendant might sustain in consequence of improperly suing out the same.

Held: That the bond is fatally defective, it not appearing therein that it was executed by the plaintiffs, their agent or attorney; that the principal in the bond being described in the affidavit as agent of the plaintiff is not sufficient to cure the defect, and that the omission cannot be remedied by amendment.

Writ of Error to the Circuit Court for Duval county.

On the 15th day of August, 1867, a suit in assumpsit by attachment was commenced in the circuit court for Duval county, by W. A. Work & Son, against Henry T. Titus. An affidavit, bond, and praecipe were duly filed as of that day, a writ of attachment issued, and certain goods of the defendant were attached thereon.

The affidavit was made by George D. Gilchrist, and described him as agent of the plaintiffs.

The bond, in the usual form, with two sureties, was executed by said Gilchrist, as principal, "upon condition that W. A. Work & Son pay all costs, damages," &c., "to defendant," &c.

On the seventeenth day of September following, the defendant moved the judge of said court, in vacation, to dissolve said attachment, on the ground that the bond filed in the cause was not in compliance with the statute in such case made and provided, inasmuch as it did not describe said Gilchrist as agent, or state that it was executed by said plaintiffs or by their agent.

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The judge ruled that the bond was not in compliance with the statute. To which ruling the plaintiffs excepted, and moved to amend. The motion being granted, the plaintiffs, by their attorneys, proposed to amend by themselves adding the word "agent" after the name of said Gilchrist, the principal in the body of the bond. Whereupon the judge ruled that the amendment proposed must be made by said Gilchrist in person, and as he was not present, the attachment was dissolved and the case dismissed. To this ruling the plaintiffs also excepted.

Fleming & Daniels for Plaintiffs in Error.

1. Is the attachment bond filed in this case sufficient under the statute?

A writ of attachment "shall in no case be issued unless the party applying for the same, or his agent or attorney, shall first make oath in writing that the amount of the debt or sum demanded is actually due," &c. Thomp. Dig., 367, sec. 2.

By an examination of this section, the terms of which constitute the foundation of the writ, we perceive that though the language of the Legislature is negative, the intention is positively to direct that the writ be issued whenever the requirements of the statute are met.

The requirements of this section were fully met when George D. Gilchrist presented himself to the clerk of the court as agent of W. A. Work & Son, and having established to the satisfaction of that officer that he was the agent, took the oath prescribed, describing himself in the affidavit as "agent" of said W. A. Work & Son.

An affidavit by the agent or attorney made to procure a garnishee summons needs not state affirmatively the character of the affiant; the use of the word agent, or attorney, by way of recital or description, is sufficient. 2 Mich., 555.

"It is not necessary that the affidavit for an attachment, when made by a person other than the plaintiff, should state that the affiant made it for the plaintiff." 18 Ark., 236.

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The presumption is, that the officer, before issuing the writ of attachment upon application of the agent, required legal evidence of authority of agency. 5 Howard, Miss., 581.

In the affidavit in this case, the affiant is described as agent of W. A. Work & Son. His agency is sufficiently set forth, and becomes a matter of record. The bond is entitled as of the suit of his principals. He makes himself responsible for their acts. There is no ambiguity on the face of the record as to the character in which he presents himself before the court.

If the fact of agency were denied, it should have been taken advantage of by plea in abatement. Doe vs. Martin, 23 Miss.; 1 Cush., 588.

Sec. 4, page 368, Thomp. Digest, says: "No attachment shall issue until the party applying for the same by himself, or by his agent or attorney, shall enter into bond, with two good and sufficient securities, payable to the defendant," &c.

"Though the policy of the attachment law was to facilitate the collection of debts by giving an additional remedy to the creditor, yet the main object of that part of the statute before us was to protect the debtor from an improper use of that remedy, by requiring two good and sufficient securities to the bond. This object can as well be accomplished where the agent executes the bond in his own name as in the name of his principal.

* * * * * In this case, the agent having executed the bond in his own name, and given two good and sufficient securities, the end and purpose of the law, in our opinion, was complied with, while the consistency of the statute is preserved." 5th Fla., 280. Also see 7 How., Miss., 358; 2 S. & M., Miss., 266; 20 Tex., 221; 18 Ark., 236.

In the case cited from 5 Fla., it is evident that the bond contained no recital of agency, and in that particular was precisely similiar to the bond in the case now before this court.

2. Leave having been granted by the court below to amend the bond, was it error in the court to refuse the application to amend by inserting the word "agent" after the name of George

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D. Gilchrist in the body of the bond, in the absence of said Gilchrist?

The amendment proposed would have worked no change in the instrument. Its legal effect would not have been varied in the slightest degree. Had said Gilchrist described himself as agent in the body of the bond, he would still have been bound thereby in his individual, and not in his representative character. Had the amendment been permitted, the sureties would still have been his personal sureties—without any increase, diminution, or change whatever in their liability.

The right to amend is given by sec. 74 of the Act known as the "New Pleading Act," approved Feb. 8th, 1861, which recites: "That it shall be the duty of the courts of this State, and the judges thereof, at all times, to amend all defects and errors in any proceeding in civil causes," &c. The attachment bond was a proceeding—every step in a cause is a proceeding; the cause was a civil one, and it was pronounced defective. The language of the statute is imperative; the amendment should have been permitted.

Wheaton & Andrews for Defendant in Error.

HON. T. T. LONG, Judge of the Suwannee Circuit (who sat in this case in place of Baker, J., disqualified), delivered the opinion of the court.

The rulings of the court excepted to and relied on are as follows:

1st. That the court erred in holding that the bond was insufficient, "inasmuch as George D. Gilchrist, the party principal thereto, is not described in the said bond as agent of plaintiff; nor does it appear that said bond was executed by the said plaintiffs or their agents."

The statute requires, before a writ of attachment can issue, that the parties suing out said attachment must make the necessary affidavit, and enter into bond, with two good and sufficient securities. A failure to make the proper affidavit in

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terms of the law, or to give the bond as prescribed by the statute, authorizes the judge of the court, either during the term of the court or in vacation, to dissolve the same. Does the bond given in this case come up to the requirements of the statute? Did the plaintiff, his agent, or attorney give the required bond? We think clearly not. The bond purports to have been given by George D. Gilchrist in person. In no part of the bond does it appear that he was the plaintiff, the agent, or attorney; and for aught we know from the bond, it is a voluntary act of a stranger to the proceedings. There is no recital in the body of the bond that he is a party in interest, or agent, or attorney; but to the contrary, that W. A. Work & Son are the plaintiffs. The bond is separate and independent of the affidavit, and must stand or fall upon its own merits. Was the objection to the bond that it was merely informal, or a clerical mistake, it doubtless could be amended, and would not be held void against the obligors. In statutory proceedings, whilst the court is not disposed to construe the statute with too great vigor, it is equally unwilling to depart from settled principles, especially when in thus departing it conflicts with the statute itself. The statute governing this class of proceedings is precise and positive, and admits of no doubt or ambiguity, and evidences to the mind of this court that the bond is fatally defective.

The other point taken is, can a party amend the bond as desired and asked for by plaintiff's counsel? If such an amendment could be made, it would impair the lien of defendant, if not entirely destroy it. The sureties were bound with one George D. Gilchrist, and not George D. Gilchrist, agent. The amendment would entirely change the character of the bond. Even if Gilchrist were present in person, he could not change it, especially when there is no evidence whatever that he is, or was at the time of signing said bond, the authorized agent of plaintiffs; and this court will not seek to ascertain that fact by testimony *dehors* the record.

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The "Act to Amend Pleading and Practice in Courts of this State," (pamphlet laws, 1860,) making it the duty of the courts of this State to amend all defects and errors in proceedings in civil causes, cannot be so construed as to allow parties *al libitum* to change the character of a bond, or amend the defects in the affidavit upon which the bond was given.

The judgment of the court below is affirmed.

NOTE—This case was decided before the organization of the present Supreme Court, and should have been reported in Part I of this volume of reports, but was omitted.—[REPORTER.

**MICHAEL A. CLONTS, SHERIFF OF MARION COUNTY, PLAINTIFF
IN ERROR, vs. H. L. RITCH, DEFENDANT IN ERROR.**

1. A judgment is a general lien upon real estate, and a court of law cannot control that general lien by directing execution of the judgment against specific portions of the property of the defendant in execution to the exclusion of other portions equally subject to the general lien, on account of equities claimed to exist in favor of a person not a party to the judgment or execution.

This was a writ of error to the Circuit Court for Marion county.

The facts are fully stated in the opinion.

E. M. L'Engle, for the Plaintiff in Error.

S. M. G. Gary, for the Defendant in Error.

WESTCOTT, J., delivered the opinion of the court:

Adam L. Eichelberger is indebted to H. L. Rich, the petitioner in the court below, in the sum of twelve thousand dollars, which is secured by mortgage upon certain real estate of Eichel-

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berger in Marion county. At the date of the execution of this mortgage it is alleged that an examination of the office of sheriff and clerk of the county disclosed no unsatisfied executions against the mortgagor, and a certificate of the clerk to the effect that no liens existed on the property was given. There was, however, at the time, in the hands of the ex-sheriff of the county, an unsatisfied execution against the mortgagor and Jacob W. Eichelberger and John B. Eichelberger in favor of one William Royall for the sum of six hundred and thirty-seven dollars and ninety-four cents. Upon this execution sundry payments had been made.

After the execution of the mortgage, upon application to the court, this execution was renewed for the balance alleged to be due, and was levied upon the lands embraced in the mortgage to Ritch, while other executions bearing date since the date of the mortgage were levied upon other lands of Eichelberger, the defendant in execution. Upon this state of facts, Rich, the mortgagor, files a petition in vacation before the judge of the circuit setting up the facts before stated, as well as that the court which the executions junior to the mortgage were levied upon which the executions junior to the mortgage were levied of sufficient value not only to satisfy these executions, but well all liens superior to the mortgage, including the execution in favor of Royall, and that the other defendants in execution with Eichelberger are possessed of sufficient property to satisfy the Royal execution, and prays "a rule nisi against Clonts, sheriff, to show cause why said mortgaged lands be levied upon, and why he does not levy and sell other of the said Adam L. Eichelberger to satisfy all executions, and that if the said mortgage in favor of the said mortgagor, then, and in that event, to proceed with the mortgaged lands mentioned to satisfy the balance of the proceeds of the said sale shall be exhausted, or his attorney, shall fail to do so, and that unless the

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show to this honorable court good and sufficient cause, that the said *rule nisi* be made absolute; and that until said cause shall be shown the said sheriff be enjoined from any proceedings which will prejudice the security of the said H. L. Ritch until the further orders of this honorable court," &c.

The judgment of the court, after demurrer, and motion to dismiss, and various proceedings, which it is unnecessary to mention further than to say they bring, in every aspect of the case, the matter of irregularity and jurisdiction to the attention of the court, was as follows:

"Upon reading and considering the petition and answer in the above cause, it is ordered, that the lands mentioned in said petition, and which are contained in the indenture of mortgage by Adam L. Eichelberger to H. L. Ritch, bearing date 16th March, 1866, shall not be sold to satisfy executions of superior liens to said mortgage until the proceeds of the sales of all other lands of the said Adam L. Eichelberger have been exhausted to satisfy the same, and then only in the event H. L. Ritch, his agent or attorney, shall fail to discharge and satisfy such deficiency after said proceeds have been exhausted."

A writ of error now brings this judgment here for review, and the errors assigned involve the points, whether a judge of the circuit court in vacation, sitting as a common law judge, can make such an order or hear and determine such proceedings, as well as the propriety of the order made.

From this statement of the case the question here is, can the judge of the circuit court, out of term, upon a petition filed against the sheriff by a mortgage of a defendant in execution, direct the sheriff to proceed against particular portions of the property of the defendant in execution until they are exhausted, to the exclusion of certain other portions of the property which have been levied upon by the sheriff under the execution on account of certain equities which the mortgagee claims exists, and which, in his judgment, entitle him to an appropriation of the proceeds of the mortgaged premises *as against the plaintiff in execution*,

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whom he claims has a general lien against the whole estate under a judgment at law, while his is only a special lien under his deed of mortgage?

The mere statement of the proposition discloses that the sheriff, the officer who executes the process of the court in such a proceeding, is really little more than a *pro forma* party, and that the essential equities upon which the mortgagee bases his prayer for relief exist, if at all, between him and the plaintiff in execution. While this is true, the plaintiff in execution here is no party to the proceeding, and the execution of his judgment at law upon property subject to its general lien is controlled and postponed.

This judgment at law is a general lien upon the real estate of the defendant in execution at law; that general lien cannot be controlled in the manner here sought; it is universal, and a court of equity, which corrects that wherein the law on account of its universality is deficient, is the only tribunal possessed of the necessary appliances as well as power to act in such manner, which, while it protects all, it sacrifices none to extend that protection.

A court of law cannot, either in term or vacation, pass such an order as this.

The defendant in error insists that the judges of the circuit courts, as courts of law, have such power under the statutes of this State.

There is no claim here that the execution issued illegally, nor is this a proceeding instituted by the defendant in execution under the provisions of the act of February 15th, 1834. Thomp. Dig., 360, §1.

The only other statute which regulates the power of courts of law over their own process is the act of March 15, 1844, which provides "that the court before which an execution is returnable, or the judge in vacation, may, on application and notice to the adverse party, for good cause, upon such terms as the court may impose, direct a stay of the same, and the suspension of the proceedings thereon until the first term of the court thereafter,

Michael A. Clonts, Sheriff, &c., vs. H. L. Ritch—Opinion of Court.

or until a decision can be had on the same.” The “adverse party” indicated in this section is not the sheriff in such a case as this.

The section above was incidentally alluded to in the case of *Mitchell vs. Duncan*, 7 Fla., 14, but that case involved no question except whether the act of 1844 repealed the act of 1834.

In the case of *Robinson et al. vs. Frew et al.*, 8 Fla., 355, it was decided that under this statute “a court of law had power to afford relief where a sale was about to be had on a day not authorized by the statute which regulated the days upon which sales of property under execution were to be made.” It was there remarked, “that courts of law have full power to revoke, correct, restrain, or quash their own process in the course of their own ordinary jurisdiction,” and that “there is a manifest impropriety in a court of chancery interfering with the process of a court of law which is the peculiar property of that court, unless its jurisdiction is expressly claimed by *equities alleged outside of and apart from the process.*”

Without intending to express either assent or dissent to these very general remarks, it is clear that under it, where equities are claimed and they exist, if at all, outside of and apart from the process, and arise as in this case from a mortgage held by one not a party to the process, that a court of law cannot afford relief. There is nothing decided in that case which would justify the court below in assuming the jurisdiction it did.

The necessity of all the parties in interest being before the court in this case is manifest. New parties here must be made, and the proceeding at law is not suitable or adequate to accomplish the object sought. The only remedy is in a court of equity, where all interests may be heard and where all rights may be adjusted, if indeed the mortgagee has such equities as entitle him to such relief, a question we do not determine.

It is ordered, adjudged, and decreed that the judgment of the court below is reversed and set aside; that the cause be remanded

Paul Crippen vs. Felix Livingston—Opinion of Court.

with directions to dismiss the petition, without prejudice to the right of the party to file a bill in chancery against such parties, and praying such relief as he may be advised.

PAUL CRIPPEN, PLAINTIFF IN ERROR, vs. FELIX LIVINGSTON,
DEFENDANT IN ERROR.

1. A writ of error is not commenced or brought and prosecuted with effect within the meaning of the statutes of this State until it is filed in the court which rendered the judgment. The day on which it is issued or bears test is immaterial.

Writ of error to the Circuit Court of Nassau county.

This was a motion to dismiss the writ upon grounds stated in the opinion, to which reference is made for a full statement of the facts.

B. B. Andrews for Plaintiff in Error.

Felix Livingston for Defendant in Error.

WESTCOTT, J., delivered the opinion of the court:

This case is brought here by a writ of error upon judgment rendered in the circuit court in Nassau county, and a motion is now made to dismiss the writ upon the ground that it has not been prosecuted within the time required by the statute. It appears from the certificate of the clerk accompanying the record that the judgment in this case was rendered and recorded on the 21st of December, A. D. 1866, and that the 22d day of December, A. D. 1866, was the last day of the term. The writ of error, by which the case is brought here, was issued from this court on the 19th December, A. D. 1868, and was filed in the court below on the 2d January, A. D. 1869.

Paul Crippen vs. Felix Livingston—Opinion of Court.

The act of 1861 (ch. 1096, §49, Laws of Florida) provides that “no judgment in any cause shall be reversed or avoided for any error or defect therein, unless error be commenced or brought and prosecuted with effect within two years after such judgment signed or entered of record.”

The corresponding act controlling this subject in the courts of the United States (act of 1789, ch. 20, §22) provides that writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, and the Supreme Court of the United States has held that a writ of error is not *brought* in the legal meaning of the term until it is filed in the court which rendered the judgment, and that the day on which the writ may have been issued, or on which it bears test, are not material in deciding the question. 11 Howard, 208.

The record of the inferior court is not transferred, its proceedings are not affected, and, indeed, but little follows the simple issuing of the writ. Our statute requires that the writ shall be commenced and prosecuted with effect, or brought and prosecuted with effect, the words being: “Unless error be commenced or brought and prosecuted with effect” within two years after judgment signed or entered. To come within the legal meaning of this statute, the writ must be filed in the inferior court before two years after judgment entered. In this case two years and twelve days have transpired. We deem it unnecessary to determine what may be the effect of a failure to serve the *scire facias* to hear errors “at least twenty-five days before the first day of the term to which the writ of error is returnable.”

Under the rules of this court and the statute we think the proper method to take advantage of the limitation of the statute is by this motion or a motion to quash. Our practice in such matters corresponds under the rules to the practice of the Supreme Court of the United States, and this is the practice in that court. 11 Howard, 208.

The writ must be dismissed.

Peter J. McKenzie Orthing vs. Joseph Gundersheimer—Opinion of Court.

PETER J. MCKENZIE ORTHING, SURVIVING PARTNER OF THE LATE FIRM OF MCKENZIE ORTHING AND CHISHOLM, PLAINTIFF IN ERROR, VS. JOSEPH GUNDERSHEIMER, DEFENDANT IN ERROR.

1. Where the pleadings are regular, and the defendant's attention on crossing plaintiff's interrogatories for the examination of witnesses is called to the character of a draft upon the defendant, which draft is a proper cause of action in the case under an agreement of the parties, "not being advised of the particular character of the draft," under such circumstances, is no such matter of surprise as to authorize a new trial.

2. If from a general review of the case there was evidence to justify the verdict, and it does not clearly appear that there have been errors in law or fact which necessarily operated to the prejudice of the defendant, a new trial will not be granted for surprise.

Writ of error to the Circuit Court for Escambia county.

The case is fully stated in the opinion of the court, to which reference is made.

C. W. Jones for Plaintiff in Error.

C. C. Yonge for Defendant in Error.

WESTCOTT, J., delivered the opinion of the court:

This was an action of assumpsit brought by the plaintiff against the defendant as the surviving partner of the late firm of McKenzie Orthing and Chisholm.

The counts of the declaration are for the price and value of goods sold, for work and labor, for money lent, for money paid by plaintiff for the use of the defendant, for money received for the use of plaintiff, and for money found due upon an account stated.

The defendant plead the general issue, payment, and set off in short by consent.

Peter J. McKenzie Orthing vs. Joseph Gundersheimer—Opinion of Court.

Upon the trial there was a verdict for the plaintiff for fourteen hundred and sixty-five dollars and forty-eight cents, whereupon defendant moved for a new trial upon the grounds hereinafter stated, which motion was overruled, and a judgment awarded, which was entered against the defendant, omitting his description as surviving partner.

A writ of error is now prosecuted to this court.

The errors here assigned are:

First. That the court below erred in refusing to grant the motion for a new trial asked for by plaintiff in error.

Second. In rendering judgment against the plaintiff in error individually, when it appears that the suit was against him as surviving partner of McKenzie Orthing & Chisholm.

Third. Because there is error in the statement sent in by the jury as the basis of their verdict which accompanies the record, as it shows they gave interest against the defendant on the open account from a period before the commencement of the suit.

Fourth. Because there is error in the charge given by the judge to the jury in this case on the trial, in telling the jury that the only question which they had to determine was the *amount* of the *indebtedness*.

The first assignment of errors requires a review of the judgment of the court below overruling the motion for new trial.

The motion was made on the ground of surprise, and the matters of surprise alleged are:

First. That, owing to the general character of the pleadings, the defendant's counsel was not advised of the particular character of the draft drawn by Chisholm on defendant in payment of the debt alleged to be due by Dycus to the plaintiff.

The consideration of this matter renders it necessary to ascertain the precise character of this draft, as well as to determine whether due diligence would not have enabled the defendant to have obtained a full knowledge of its character, and if there was surprise, what was its cause?

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It appears that in April, 1866, one Dycus was indebted to the plaintiff in the sum of nine hundred and fifty dollars, and that to settle this debt Chisholm, the now deceased partner of the firm of Orthing & Chisholm, gave his draft upon his co-partner, Orthing, the defendant, for that sum; and it also appears that Chisholm at the same time represented to plaintiff that the firm of Orthing & Chisholm was indebted to Dycus in that sum, and that the effect of this arrangement was intended to be that the indebtedness of the firm of Orthing & Chisholm should be transferred to the plaintiff, and thus relieve Dycus of his debt to plaintiff, as well as discharge the debt of Orthing & Chisholm to Dycus.

From the evidence in the record there was ground for the jury to conclude that the defendant had accepted this draft and affirmed the action of his partner, and thus become liable for it to the plaintiff; and whether the firm of Orthing & Chisholm was or was not indebted to Dycus could make no difference. The plaintiff states in his testimony in substance that Orthing accepted the draft for nine hundred and fifty dollars, and that he gave him the draft on New York to discharge it, and another draft for seven hundred and eight dollars and thirteen cents, which he had accepted verbally; and the witness Cater states in his testimony that he was present at a conversation between plaintiff and defendants, and that defendants agreed to pay the indebtedness of G. B. Dycus to plaintiff, amounting to nine hundred and fifty dollars, Orthing thus affirming the act of his co-partner, Chisholm, and Dycus states that he delivered lumber to Chisholm, one of the firm of Orthing & Chisolm, to the amount of the debt he owed Gundersheimer. Nor does the defendant in his testimony deny expressly his acceptance of the draft or his affirmance of the act of his co-partner. Under this state of facts there is certainly nothing extraordinary in the character of the draft.

There is nothing in the record which would induce the belief that defendant was not fully aware of the character of this

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draft. He nowhere denies it. It is in evidence that it was the custom between plaintiff and defendant to settle their accounts monthly, and the defendant does not deny it.

Another important fact affecting the matter of surprise is, that under an agreement of the parties which is found in the record, it was understood before going to trial "that the whole cause of action between the parties should be determined under the declaration without the necessity of bringing two suits, no objection to parties." It resulted from this agreement that it was immaterial whether this draft represented a joint or a several debt, because, as surviving partner, it was a cause of action against defendant if it represented a debt of the late firm, and so, also, was it a cause of action if it was a draft accepted by him under such circumstances as would make it a separate debt. This is the only intelligent construction that can be given to this agreement. If there was a want of knowledge of the character of the draft upon the part of the defendant's counsel, it does not clearly appear that it was not occasioned by the want of sufficient diligence and accuracy on the part of the defendant in imparting knowledge of the facts of his case. In addition to this, the testimony which disclosed the precise character of the draft was taken upon interrogatories, and the direct interrogatories, which were crossed by the attorney, disclose the character of the draft, or at any rate what its character was in the estimation of the plaintiff, and that was the case the defendant should have prepared to meet.

The next matter of surprise alleged is that defendant's counsel was not advised of the "irresponsibility of defendant under the statute of frauds." Surprise grounded on a mistake in law is not ordinarily a ground for new trial, nor do we perceive that there was any collateral promise for the undertaking of another in this case. It appears from the testimony of Collins that Dycus holds the plaintiff's receipt for the amount of his debt to him, \$950. The contract here is to this effect: plaintiff, in consideration of a draft drawn by Chisholm upon Orthing for

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the amount of Dycus' debt to him, gives Dycus a receipt; discharges him from liability. There is no collateral promise. This draft, when accepted by Orthing, became an original undertaking not within the statute, and this is true whether the draft under the circumstances represented a joint or a several debt. Even if the debt of Dycus to plaintiff was the original cause of the promise, and not any indebtedness of Orthing & Chisholm to Dycus, yet if the plaintiff to whom this promise was given, with the knowledge and consent of the defendant, and in consideration thereof, relinquished his claim against Dycus, an advantage which he possessed, the promise by the defendant to pay the debt in consideration of such relinquishment is an original promise. 6 M. & S., 204; 3 Burr., 1886; 4 Bing., 264; 4 D. & R., 7; 1 B. & Ald., 297.

As to the second matter of surprise alleged, it is to the effect that owing to the general character of the pleadings, defendant's counsel did not appreciate the circumstances under which the draft for nine hundred and fifty dollars was drawn, and was not prepared to prove that the firm of Orthing & Chisholm was not indebted to Dycus in that sum.

Chisholm was a member of the firm, and the testimony is that he represented to plaintiff that the debt of the firm of Orthing & Chisholm to Dycus was \$950, and if it was ascertained to be other than he represented, this fact alone could not affect plaintiff's right. As to whether the drawing of the draft upon Orthing was within his powers as a partner, under the circumstances, is a question which we do not deem it necessary to decide, because the conclusion of the jury was evidently that the fact had affirmed the act of Chisholm, and that the draft had been accepted or the indebtedness and liability expressly acknowledged and satisfied by the payment of one thousand dollars whether it was an acceptance and payment in behalf of the firm or individually makes no difference, as under the agreement plaintiff was entitled to judgment in either event. The defendant obtained credit for the one thousand dollars paid,

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makes no difference whether it was applied to the draft for nine hundred and fifty dollars or to the other draft and open account, as each was a cause of action under the agreement.

The motion for a new trial was therefore properly overruled.

The second error assigned is that the judgment is against the defendant in the court below individually, when it appears that the suit was against him as surviving partner. Without deciding what would be the effect of this under other circumstances, this form of judgment here cannot be objected to on the part of the defendant. He is estopped by his agreement admitting all causes of action, without any objection as to parties, under the declaration as framed.

As to the third error assigned, the interest on the open account was calculated from the date it became due and payable, which was correct.

As to the fourth error assigned, there was no charge upon any fact within the meaning of the statute. If the draft for nine hundred and fifty dollars was disallowed, and every payment claimed by defendant allowed, there was a balance due about which there was no contest. Had the entire claim been denied, then the entire amount would have been in issue, and the court could not properly have stated as a fact in its charge that the only question for the jury to determine was the amount of indebtedness, as this implies, what is admitted here, that something was due, or it may be that in all actions of this kind the only question is the amount of indebtedness; but this is immaterial, as giving it the construction most favorable to the defendant there is no error.

Upon a review of the evidence the judgment is not so clearly wrong as to justify an appellate tribunal in controlling the discretion of the court below in the matter of the motion for a new trial on the ground of surprise, nor are there such errors in the record as call for a reversal of the judgment.

It may be remarked in this case, that there is no bill of exceptions in the record framed according to the requirements of

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law. There is simply an accumulation of what purports to be the evidence upon the trial, without the signature or certificate of the judge.

It was necessary in the consideration of the matter of surprise that the facts should have been brought to this court by bill of exceptions.

The judgment of the court below is affirmed.



APPENDIX.

OPINIONS

OF THE

SUPREME COURT

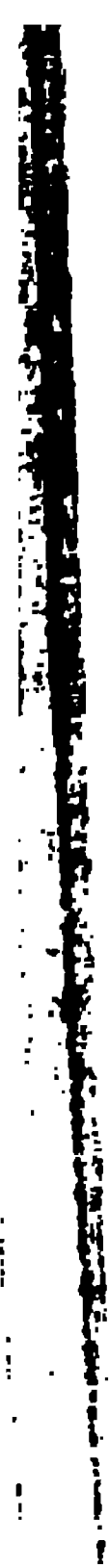
OF THE

STATE OF FLORIDA,

RENDERED TO HIS EXCELLENCY

THE GOVERNOR,

IN THE YEARS A. D. 1868-9.



OPINIONS
RENDERED TO HIS EXCELLENCY THE GOVERNOR,
IN THE YEARS A. D. 1868-'9.

**IN THE MATTER OF THE EXECUTIVE COMMUNICATION OF THE
14TH OCTOBER, 1868.**

1. Members of what is known as the "Secession Convention" were neither executive nor judicial officers of this State, within the meaning of these terms as used in Section 1, Article XVI., of the Constitution of this State. A person who was a member of such Convention, and signed the ordinance of secession, and who afterwards gave aid and comfort to the enemies of the United States, is not prohibited from holding any office, executive, legislative, or judicial, in this State.

The justices of this court are in receipt of an executive communication of the 14th instant, wherein is solicited an opinion as to whether, under Section 1 of Article XVI. of the Constitution, "a person who was a member of the Secession Convention, and signed the ordinance of secession, can hold any official position, legislative, executive, or judicial, in this State, or act as deputy for any officer, or act in a *clerical* capacity in any department of the government."

The provision referred to is, that "no person shall * * hold any office, civil or military, * * under any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid and comfort to the enemies thereof." And all such persons are

Opinions rendered to the Governor—Qualifications to hold office.

“debarred from holding office in the State of Florida” until the disability shall be removed by Congress.

I. An “office” is a public charge or employment.

An “officer” is a person commissioned or authorized to perform any public duty.

An “official act” is an act done under some authority derived from the law, or in pursuance of prescribed duties, and has the force of law.

“Each officer of the State, *including* members of the Legislature,” is required to take an oath or obligation, binding him to “faithfully perform the duties of the office.” Sec. 10.

An officer of the State, then, is a person in a public charge or employment, commissioned or authorized to perform any public duty, under an oath to support the Constitution and Government, and to perform the duty faithfully.

A mere copying clerk or laborer in a public office is not an officer, (unless he is authorized or required *by law* to perform certain duties,) but is a servant or employee, whose “*order*” or “*certificate*” has no legal force.

A *deputy* or *assistant* must be one whose acts are of equal force with that of the officer himself, must act in pursuance of law, perform official functions, and is required to take the oath before acting.

II. The “Secession Convention,” so-called, was not a “State Legislature.” Its members were not “executive” officers, nor “judicial” officers of the State, but merely and strictly delegates; were not required by any law to take an oath of office, and its records do not show that they were sworn in any form whatever.

By the passage of the Ordinance of Secession, “insurrection or rebellion” was probably inaugurated, and perhaps “aid and comfort” were given to the “enemies of the United States;” and if so, those who had “previously taken an oath” as certain officers, and subsequently voted for or signed the “Ordinance of Secession” which passed, are included in the disability men-

Opinions rendered to the Governor—Quorum—Impeachment.

tioned, and until relieved are incapable of holding offices; but "persons who had previously" been "members of the Secession Convention" and afterwards "engaged in insurrection or rebellion" are not necessarily included in such disability.

The provision referred to is obviously penal in its character, and judicial tribunals have ever been strict constructionists in dealing with enactments of that class, whether in the fundamental law or ordinary statutes.

As to the eligibility of persons to be members of the Legislature, the Legislature itself is the sole judge.

For the court.

E. M. RANDALL, Chief-Justice.

SUPREME COURT, Tallahassee, Fla., Oct. 19, 1868.

IN THE MATTER OF THE EXECUTIVE COMMUNICATION OF THE
9TH OF NOVEMBER, A. D., 1868.

Sect. 8, Art. IV., of the Constitution provides that "a majority of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may compel the presence of absent members, in such manner and under such penalties as each House may prescribe."

1. The term "House" in this clause of the Constitution, when used in reference to the matter of quorum, means the entire number of which the general legislation is not less than a majority of the whole number of Assembly or Senate *may be composed*. A quorum for the purposes of which the "House" *may be composed*. Vacancies from death, resignation, or failure to elect, cannot be deducted in ascertaining a quorum.

2. To constitute an impeachment so as to be effective under the Constitution to suspend the officer, the articles of impeachment must be presented to the Senate, and a constitutional quorum of the Senate must receive them.

Opinions rendered to the Governor—Letter of the Governor.

EXECUTIVE DEPARTMENT,

TALLAHASSEE, 9th November, 1868.

To the Honorable Justices of the Supreme Court of the State of Florida:

As Governor of the State of Florida, I hereby, under and in pursuance of the sixteenth section of the fifth article of the Constitution of the State, require the opinion of your Honors as to the interpretation of certain portions of said Constitution, and upon certain points of law hereinafter mentioned and stated, and respectfully request that you render me such opinion in writing.

For the information of your Honors, I present herewith a copy of the proceedings of the Joint Legislative Convention, begun and held at the Capitol, in the City of Tallahassee, on the third day of November, in the year of our Lord one thousand eight hundred and sixty-eight, pursuant to adjournment, and in accordance with the provisions of An Act entitled "An Act prescribing on the part of this State the manner of appointing Electors of President and Vice-President of the United States," approved August 6th, 1868, marked Exhibit "A," and a copy of what purports to be a "Senate Journal, at an Extraordinary Session of the Legislature convened at the Capitol, at Tallahassee, Florida, on Tuesday, the 3d day of November, A. D., 1868, at eight o'clock, P. M., by virtue of a proclamation of the Governor," marked Exhibit "B" and copy of what purports to be a "Journal of the Assembly, at an Extraordinary Session of the Legislature convened at the Capitol, at Tallahassee, Florida, on Tuesday, the 3d day of November, A. D. 1868, at eight o'clock, P. M., by virtue of a proclamation of the Governor," marked Exhibit "C," which said Exhibits A, B, and C, I respectfully ask may be taken and considered as a part hereof.

Article III., on "Distribution of Powers," provides: "The powers of the government of the State of Florida shall be divided into three departments, to wit: Legislative, Executive, and Judicial, and no person properly belonging to one of the depart-

Opinions rendered to the Governor—Letter of the Governor.

ments shall exercise any functions appertaining to either of the others, except in those cases expressly provided for by this Constitution."

Section 1, of Article IV., of the Constitution provides that "the Legislative authority of this State shall be vested in a Senate and Assembly, which shall be designated the Legislature of the State of Florida, and the sessions thereof shall be held at the seat of government of the State," and section 8 of the same article provides that "a majority of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may compel the presence of absent members, in such manner and under such penalties as each House may prescribe."

Section 8, of Article V., of the Constitution provides: "The Governor may on extraordinary occasions convene the Legislature by proclamation, and shall state to both Houses, when organized, the purposes for which they have been convened, and the Legislature then shall transact no legislative business except that for which they are especially convened, or such other legislative business as the Governor may call to the attention of the Legislature while in session, except by the unanimous consent of both Houses."

An interpretation of these several provisions of the Constitution is required in order to determine:

First. Whether a Legislature of the State of Florida, consisting of a "Senate" and "Assembly" vested with the legislative authority of the State, has convened in Extraordinary Session under the proclamation of the Governor of November 3d, A. D. 1868.

Upon this point, to assist your Honors in interpreting said provisions of the Constitution with reference to the facts, I refer your Honors more particularly to Exhibit "B," or "the Journal of the Senate," from which it will be seen that the Senate, as a co-ordinate branch of the Legislature of the State, had not, at any time, since it assumed to do business in conjunc-

Opinions rendered to the Governor—Letter of the Governor.

tion with the Assembly, under said proclamation, a quorum consisting of a majority of its members. That I called the attention of the Senate and Assembly, as soon as the official records disclosed the same, to this fact in my message to them of November 3d, which message appears in said exhibit "B." That certain persons who assumed to act as Senators, to wit: George J. Alden, Horatio Jenkins, Jr., C. R. Mobley, and Robert Meacham, had, before assuming so to act vacated their positions as Senators, and their seats in the Senate had been declared vacant by "proclamation for notice of election" of 28th October, A. D. 1868, duly made and published and a copy of which "proclamation," marked Exhibit "D," is presented herewith to be taken and considered as a part hereof. That, excluding said persons who had assumed so to act as Senators, there were in the Senate only eight Senators whose names appear upon the Senate Journal, to wit: Messrs. Gunn, Katzenberg, Krimminger, Moragne, Underwood, Smith, Bradwell, and Pearce.

It is provided in section 29, of Article XVI, of the Constitution, that "there shall be twenty-four Senatorial Districts." The Senate, therefore, as one of the "*Houses*" of the Legislature, being composed of *twenty-four Senators*, cannot without a *majority* constitute a *quorum* to do business, and any legislative business transacted by it with eight members, which is five less than a majority, is clearly without constitutional sanction and is void.

If your Honors, in interpreting said provisions of the Constitution, should give me the opinion that there has not convened under said proclamation in Extraordinary Session, a Legislature of the State, consisting of a Senate and Assembly, vested with the legislative authority of the State, competent to transact legislative business, it would be unnecessary to trouble you further; but if your opinion is otherwise, then I present for your interpretation and opinion:

Second. Admitting, under the several provisions of the Con-

Opinions rendered to the Governor—Letter of the Governor.

stitution referred to, that a Legislature of the State, consisting of a Senate and Assembly duly organized and vested with the legislative authority of the State, had convened in Extraordinary Session under the proclamation aforesaid, and were, under the Constitution, competent to transact legislative business, are the proceedings of said Legislature, as shown by said Exhibits B and C, in so far as they relate to my impeachment as Governor of the State of Florida, of constitutional validity of force, and am I, under section 15, of Article V., and section 9, of Article XVI., disqualified from performing the duties of my office, by reason of the proceedings had and taken as aforesaid in reference to my impeachment?

Upon this point I respectfully refer your Honors to my proclamation of November 3d, A. D. 1868, concerning said Extraordinary Session, and to my message of same date, addressed to the Senate and Assembly, both of which appear in said Exhibits B and C, and present for your consideration the fact that neither in said proclamation or message is it stated, or can it be implied, that among the purposes for which said Legislature was convened was my impeachment. Nor have I called to the attention of said Legislature, while in session, any other legislative business than that for which they were especially convened by said proclamation, and mentioned in said message.

I further present for the consideration of your Honors, that the Assembly, in originating and bringing before itself and Senate these impeachment proceedings, were acting in their legislative capacity, and the members thereof sitting as legislators; and that in so doing they were transacting legislative business other than that for which they were especially convened, and this too, without the unanimous consent of both Houses, to wit: of the Assembly and Senate, all of which will more fully appear by reference to said Exhibits B and C.

It should be *affirmatively* shown by said Exhibits B and C that such *unanimous* consent was first had and obtained, and if it should be made to appear that objection was made to the

Opinions rendered to the Governor—Letter of the Governor.

transaction of any other legislative business than that for which said Extraordinary Session was especially convened, I not only call your Honor's attention to said Exhibit "C," where objection does so appear to have been made by a member of the Assembly, but to the accompanying affidavits, marked Exhibit "E," and which I respectfully ask may be taken and considered as a part thereof.

In asking the opinion of your Honors upon the grave questions above submitted, I feel it my duty to bring before your attention the fact—that upon said proceedings for my impeachment, the Lieutenant-Governor of this State, William H. Gleason, has at once assumed to be the Acting Governor thereof; that said Gleason has issued a proclamation as such Acting Governor, a copy of which is herewith filed, marked "F," and which I ask may be taken and considered as a part hereof; that I am still in possession of the Executive Chamber, in the Capitol of the State; that said Gleason, as acting Governor as aforesaid, has demanded of me the surrender of the Executive Department. This demand I refused, stating to him that I claimed to be, under the Constitution and laws of this State, the rightful Governor thereof; that I should continue to exercise all the power and authority, and discharge all the duties belonging to the Executive Department until the courts should determine otherwise; that should the judicial tribunals of the State determine against me, I should, like any other good citizen, not only render peaceful but immediate obedience; that I am continuing to act as Governor, and that said Gleason is also assuming to act as Governor; that the officers of the State do not know, in this unsettled and anomalous condition of things, whom to recognize as the head of the Executive Department; that the administration of the State government is obstructed, and the peace and welfare of the whole State jeopardized. It is but natural that I should, therefore, under such circumstances, seek your counsel and opinion at the earliest moment, and you will pardon me for urging you, in view of the possibly momentous

Opinions rendered to the Governor—Letter of the Lieutenant-Governor.

results of these issues, to furnish me your opinion at the earliest practicable moment.

I will state, in conclusion, that I have foreborne, as I felt it my duty to do, to bring to your notice any matter of political controversy, and I will add, that if, in your opinion, it is proper to give Lieutenant-Governor Gleason notice of this paper, to the end that he may, as a party at interest, be represented before your Honors, you can direct the clerk of the court to hand him a copy hereof, if he will consent with me to submit the matter to you, and be bound by your opinion to be given in the premises. Should you desire it, I will appear before you by counsel, at such time as your Honors may be pleased to designate.

HARRISON REED,
Governor of Florida.

To the Honorable the Justices of the Supreme Court of the State of Florida:

I would respectfully inform your Honors that I have received a copy of the communication, bearing the seal of the Supreme Court, of Harrison Reed, Governor of Florida, asking the opinion of your Honors upon certain points as connected with the impeachment of Harrison Reed, Governor of Florida, by the Assembly of the State, and in reply would say:

That the journal of the Assembly shows that he was legally impeached for high crimes and misdemeanors in office, and that a presentment of the impeachment was formally and legally made to the Senate, and the Senate formally and legally agreed to entertain and take action in the matter, as is shown by the journal of the Senate. Consequently, the entire matter of the impeachment of Harrison Reed, Governor of Florida, is before the Senate in its judicial capacity, as connected with the Assembly in its appropriate capacity, it having the sole power of impeachment.

Opinion of Westcott, J.—Quorum.

As no other court than the Senate of the State has any jurisdiction whatever in matters of impeachments, and as there is no question or interpretation, or constitutional or statute law involved, but only a question of fact as to the relation of Harrison Reed, Governor, of the possession of the Executive Chamber and the Archives of the State, after his formal impeachment by the Assembly, and the recognition of myself as Lieut. and acting Governor, by both bodies of the Legislature, I do not perceive how any question connected with the matter of impeachment can possibly be submitted to your Honors for a legal opinion under the provisions of Article V., Section 16, of the Constitution of the State. Therefore, having no power to do so, I most respectfully decline to submit any question connected with the matter of impeachment to your Honors, even while I hold the opinions of your Honors upon all proper questions and matters in the highest possible estimation.

[Signed.]

W. H. GLEASON,
Lieutenant and Acting Governor.

SUPREME COURT OF FLORIDA,
TALLAHASSEE, Florida, Nov. 24, 1868.

To His Excellency, HARRISON REED, Governor of Florida:

SIR: Your communication of the 9th of November is received. It is accompanied by exhibits consisting of your proclamation of the 3d of November, calling an extraordinary session of the Legislature; of what purports to be Journals of the Senate and Assembly at such session, and a proclamation of your Excellency containing notice for an election to fill certain vacancies alleged to exist in the Senate and Assembly, occasioned by parties who were elected to seats in the Legislature having subsequently accepted offices and exercised functions appertaining to the Executive and Judicial departments of the Government.

Opinion of Westcott, J.—Quorum.

You present for our consideration several “points of law,” and require of us an opinion upon two questions involving the interpretation of several clauses of the Constitution of this State.

The first question is—Whether, upon the facts appearing in your communication, a Legislature of the State of Florida, consisting of a Senate and Assembly, vested with the legislative authority of the State, has convened in extraordinary session under your proclamation of November 3d, 1868?

The second question is—If such a Legislature has assembled, “are the proceedings,” as shown by exhibits B and C, in so far as they relate to your impeachment as Governor of the State of Florida, of constitutional validity and of force, and are you, under section fifteen of Article V., and section nine of Article XVI., disqualified from performing the duties of your office by reason of the proceedings had and taken in reference to your impeachment?

An answer to the second question is not required by your Excellency in the event that a negative reply is given to the first, your Excellency having in substance remarked that in case our opinion is that a Legislature of the State of Florida did not convene, it would be unnecessary that the court should proceed further; but if the opinion of the court is otherwise, then you present the second question for consideration.

Before expressing an opinion upon the question propounded, it may be well to determine whether there is anything in the character of the opinions required which would authorize the court to decline to act in the premises. The Governor of this State is authorized to require opinions of this court by virtue of the following clause in the Constitution of the State:

Section 16, Article V. “The Governor may at any time require the opinion of the justices of the Supreme Court as to the interpretation of any portion of this Constitution or upon any point of law, and the Supreme Court shall render such opinion in writing.”

This clause has not been embraced in the antecedent Consti-

Opinion of Westcott, J.—Quorum.

tutions of this State, and we must look to other State Constitutions having similar provisions to obtain an idea of the practice under it.

An almost entirely similar clause is found in the constitutions of Maine, New Hampshire, and Massachusetts. The character of questions considered by the courts of these States, in answer to inquiries made, will show to what extent the courts of these States have gone, and will indicate whether they have at any time felt justified, on account of the character of the questions submitted, to decline to make a reply.

In 3d Greenleaf, 447, we find that the opinion of the Supreme Court of Maine upon the construction of the following section in the Constitution of that State was required: "The number of Representatives shall, at the several periods of making the enumeration, be fixed and apportioned among the several counties as near as may be according to the number of inhabitants, having regard to the relative increase of population." Here a construction was desired of a clause which in part relates to the exercise of a purely legislative discretion.

It will not be denied that a judicial tribunal cannot review or control a purely legislative discretion. In a constitutional government such as ours, all departments are limited in their powers by the Constitution; each being independent, are severally supreme within their legitimate and appropriate sphere of action; and while it is unquestionably true that wherever a power and trust is expressly confided to one co-ordinate branch of the government, neither of the others, in a government with constitutional restrictions similar to those contained in ours, can exercise any supervisory control over the other departments when acting within the limits of their constitutional power, yet we see in this instance that the "Supreme Judicial Tribunal" of Maine did not hesitate to give a construction to this clause in the Constitution as requested.

In 3d Greenleaf, 481, the following question was submitted: "Is the office of agent, appointed under a resolution authorizing

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the Governor to appoint one or more agents for the preservation of timber upon the public lands, a civil office of profit within the meaning of Article IV., part 3, section 10 of the Constitution, so that no Senator or Representative of the present Legislature can constitutionally be appointed as agent?

In 3d Greenleaf, 481, the following question is asked: "Can any person, according to the third article of the Constitution, hold and exercise at the same time the several offices of deputy sheriff and justice of the peace?"

In 6th Greenleaf: "Do the executive duties of the State, when constitutionally exercised by the President of the Senate, devolve at the end of the political year when so exercised on the President of the Senate or Speaker of the House of Representatives of the next political year, whichever shall be first chosen, or shall such executive duties still continue to be exercised by such President of the Senate until another Governor of the State chosen by the people or by the Legislature be qualified?"

Here was a question propounded which settled a matter of controversy in that State, involving the question as to who was the Governor.

The question was asked with reference to a clause in the Constitution of that State, which was as follows: "Whenever the office of Governor shall become vacant by death, resignation, removal from office or otherwise, the President of the Senate shall exercise the office of Governor until another Governor shall be duly qualified." There was a further provision to the effect that a President of the Senate should be elected for the *term of one year*.

Hon. Nathan Cutler had been elected for the year 1829, and had discharged the duties of the office of Governor during that year, there being a vacancy in the office of Governor. Another President was elected for the year 1830. Under these circumstances, Hon. Nathan Cutler, Acting Governor, whose term as President of the Senate had expired, addressed a communication to the Justices of the Supreme Court of that State and pro-

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pounded the question above set forth. The Justices, with the exception of one, advised him that he was not authorized to act longer as Governor.

Other citations showing the extent to which the courts have gone in opinions of this character, are 7th Greenleaf, 482; 16 Maine, 474; 35 Maine, 585; 35 N. H., 578.

In the case first cited, one of the questions asked was, whether, “on the statement of facts made, Messrs. Appleton, Bodwell, Usher and Hill were constitutionally entitled to retain their seats in the Senate?” In giving their opinion the Justices remark, “The returns of votes are before the Senators, and their decision upon them will of course be in accordance with the Constitution as understood and construed by the court.”

It will be perceived that the Justices in this case go so far as to say that the Senate in making its decision must construe the Constitution in accordance with the opinion of the court, thus intimating that their opinion interpreting a clause in the Constitution as to the manner of exercising a power vested exclusively in the Senate, was a law to the Senate itself, in its action.

These precedents show that there is no power in the court to decline to give an opinion upon questions submitted by the Executive in so far as the act of giving such opinion, whenever they have been required, goes to establish the rule.

Whilst I have been thus careful to cite at some length the practice of the courts, to show their uniform course of action in other States with similar constitutions, yet I do not think that this clause in our constitution vesting this power admits of doubt as to its construction. Its language is—“The Governor may at *any time* require the opinion of the justices of the Supreme Court as to the interpretation of any portion of this Constitution, or upon any point of law, and the Supreme Court shall render such opinion in writing.”

It is evident from the language used that there is a discretion vested in the Governor as to requiring opinions, and it is equally

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plain that there is no discretion in the court, if the opinion required involves, upon a given state of facts, an interpretation of any portion of the Constitution or the expression of an opinion upon any point of law. The language is: "The Governor may *require* an opinion, and the Supreme Court *shall* render such opinion."

While this is true as to the duty of the court in reference to such communications from the Executive, it is equally true that it is not its duty to render opinions of this character to any other officer of the Government except the Governor, or to the person upon whom the functions of the executive office may at any time devolve by reason of suspension, by impeachment, or any other disability within the meaning of the constitutional provisions upon this subject. To answer this communication is, therefore, *pro tanto*, a recognition of its writer as the Constitutional Governor of Florida—to decline to answer it, is no less than a refusal so to recognize. This dilemma has been a source of no little embarrassment. The writer of the communication has been exercising the functions of the office of Governor from the organization of the Government of this State under the Constitution of 1868 up to this time, his term of office under the Constitution has not expired, and he is now, whether rightfully or wrongfully, in the exercise of the duties of the office. It is true the communication and exhibits attached, bring to the attention of the court certain proceedings, looking to impeachment, but after mature reflection as to the duty of the court in the premises, I think that an opinion should be rendered.

While I do not think that because the opinions required by the Governor may be upon points of law likely soon to be passed upon by the court in cases involving individual rights, relieves the court from its duty under the Constitution, this being, if a fault, a fault of the Constitution beyond the power of the court to remedy, yet not being required by the communication to pass upon the question alluded to (the question of impeachment), in the event that a negative answer to the first question is given, I shall not consider it.

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I now proceed to the consideration of the first question as to which an opinion is required, with the remark that in passing upon any communication of this character, the facts therein stated must be accepted as true, and the points of law arising therefrom, and in reference to which our opinion is required, must be passed upon in this view. No case being before the court in the exercise of original jurisdiction, no evidence can be introduced; there are no pleadings raising issue, and hence nothing to be proved.

The question is: Upon the facts appearing from your communication and exhibits, did a "Legislature of the State of Florida, consisting of a Senate and Assembly, vested with the legislative authority of the State, convene in extraordinary session under your Proclamation of November 3, 1868?"

What are the facts with reference to which this question is asked, and the points of law which are involved, to be determined?

It appears affirmatively from the Journal of the Assembly that there were present on the 3d of November forty members, on the 4th of November thirty-four members, on the 5th of November thirty-one, on the 6th of November thirty, and on the 7th of November thirty-four members.

So far then as the Assembly is concerned, there was a quorum present, whatever construction may be given to the requirement of the Constitution, to the effect that "a majority of each House shall constitute a quorum to do business;" but as, to constitute a "Legislature of the State of Florida vested with legislative power," (the point to which your inquiry is directed,) it is necessary that a quorum of the Senate within the meaning of the constitutional requirement recited should be present, I address myself to this specific inquiry: Was there a constitutional quorum of the Senate for the purpose of general business, present at any time during this session?

What are the facts? As they appear from your communication, and so far as they appear affirmatively from the Journals

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of the Senate, (which is a requirement according to decision in *People vs. Hatch*, 33d Ill., 156,) the highest number present at any time was twelve, and the right of four of these is questioned, upon the ground that since their election as members of the Legislature they accepted and entered upon offices incompatible with legislative functions, thus coming, as is claimed, within that clause of the Constitution of this State which provides that “no person properly belonging to one of the departments of Government shall exercise any functions appertaining to either of the others;” it being claimed that the rule of law applicable to such case is: The citizen occupying a position in one department of the Government, and being appointed or elected to another, the duties of which are incompatible with the first, is at liberty to accept and qualify and to discharge the duties of the last position; that he is free to elect which he will have, and that his acceptance of the second office is the election of that office, and the legal effect is the vacation of the other, whether by formal resignation or not.

Such a doctrine has been held in many of the States, New York, Massachusetts, Rhode Island, and Maine, and in the case of Colonel Yell, of Arkansas (a legislative precedent, 29th Congress, 2d Session,) the question was, admitting that he could not hold the position of a Representative in Congress and colonel of volunteers of the United States army at the same time, at what time did he *vacate* his office as representative? The decision was, so far as one was made, that there *existed a vacancy* from the date of the acceptance by him of the commission as colonel.

As the greater number embraces the smaller, I shall, under our Constitution, (without regard to the special Representative,) address myself to the following question:

Are twelve Senators a constitutional quorum of the Senate of this State, for the purpose of general legislative business, as contradistinguished from its power to punish for contempts, to examine returns, to compel the attendance of absent members, and other powers necessary to its organization? The whole number

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of the Senate, excluding the special Representative, is twenty four. If no less than a majority of the whole number is a quorum, then the least number constituting a quorum is thirteen. Is there anything in our Constitution, or legislative precedent, or judicial decisions, to authorize in estimating a quorum a deduction to be made for vacancies by death, resignation, expulsion, failure to elect, or other cause of this character? While the constitutional provisions on this subject are by no means the same, but on the contrary there is a very great difference, it may be well to institute a comparison between the provisions of the Constitution of the United States and the Constitution of this State, and examine the precedents, as this will enable us perhaps to come to a more correct conclusion.

I shall consider the Constitution of this State without reference to sections 7 and 8, Article XVI. Its provisions are:

Section 29, Article XVI. "There shall be twenty-four Senatorial Districts, which shall be as follows, and shall be known by their respective numbers from one to twenty-four, inclusive. The First Senatorial District shall be composed of Escambia county, the second of Santa Rosa and Walton," and so on, enumerating each Senatorial District, including the twenty-fourth. It provides further that "each Senatorial District shall be entitled to one Senator."

Section 8, Article IV. "A majority of each House shall constitute a quorum to do business."

Section 1, Article IV. "The legislative authority of this State shall be vested in a Senate and Assembly, which shall be designated the Legislature of the State of Florida."

The provisions of the Constitution of the United States are:

Section 2, Article I. "The House of Representatives shall be composed of members *chosen* every second year by the people of the several States."

Section 3, Article I. "The Senate of the United States shall be composed of two Senators from each State, *chosen* by the Legislature thereof."

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Section 5, Article I. "A majority of each House shall constitute a quorum to do business."

The language of the Constitution of this State and of the United States, in so far as that a majority of each House is required to constitute a quorum to do business, is precisely similar, but when we come to define the words "each House" and construe the several articles with reference to its definition, the difference is marked. We have in the Constitution of this State,, when we come to define the word "House," so far as the Senate is concerned, the following: "There shall be twenty-four Senatorial Districts, and each Senatorial District shall be entitled to one Senator."

We have in the Constitution of the United States when we define the word "House," as to the House of Representatives, "The House of Representatives shall be composed of members *chosen* every second year," &c.

As to the Senate, "The Senate of the United States shall be composed of two Senators from each State *chosen* by the Legislature thereof."

The word "*entitled*" with reference to this subject, occurs in the Constitution of the United States in but one place, and that is, in reference to the representation which the States were to have in the House of Representatives anterior to the first census, and hence any decision as to what constituted a quorum of the House of Representatives of the United States, after the first census was completed, was made without reference to the word "entitled" in this clause, the whole clause having become inoperative.

All decisions, therefore, made after the first census, were made only with reference to the terms, "The House of Representatives shall be composed of *members* chosen every second year," &c.

What are the legislative precedents?

The first I will mention was during the war. Journals of the House of Representatives, 37th Congress, 117.

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The House of Representatives then, in view of the clauses I have cited above, decided “several of the States *having failed to send Representatives*, that a majority of the *members chosen* constituted a quorum to do business.”

This ruling, in my judgment an incorrect one, because the word “chosen,” in the connection in which it is used, has exclusive reference to the time of election, was based upon a state of facts then existing in the United States, which do not now exist in the Senatorial Districts of Florida. At the time some of the States had refused to send members to Congress, and their citizens were in arms against the government of the United States. Admitting, however, that such a construction is correct when applied to the terms used in the Constitution of the United States, the language being “the House of Representatives shall be composed of members *chosen*,” the case is not at all in point when we are to *construe* the Constitution of this State, where, in reference to the Senate, there is no such word as chosen except when used to fix the duration of their term, and where no Senatorial District has failed to elect a Senator when an opportunity has been afforded.

The word “chosen” in the Constitution of this State is used solely in reference to the term of office and date of election.

The word “*entitled*” in the Constitution of this State is used with reference to a subject that does not vary, to wit, a Senatorial District, and if the word *House* is to be construed with reference to this term, which it must be in the connection in which it is used, it should indicate a fixed, a certain number. The term “*chosen*,” used in the Constitution of the United States, implies, indeed admits, the idea of a right of choice when used with reference to a person or “member;” the word “entitled” in our Constitution is used in reference to a fixed subject, such as a Senatorial District, and involves no such idea even in the most limited degree.

Leaving this precedent, applicable to a particular state of facts not now existing in the State of Florida, we come to a pre-

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cedent somewhat more in point, although not entirely on account of difference in the constitutional provisions:

Congressional Globe, volume 18, page 821:

“Mr. Jones, of Tennessee, raised a question of order. He contended that one hundred and fourteen members did not constitute a quorum of the House. Two members had been elected to represent the State of Wisconsin, one of whom had appeared and been this morning sworn, and the other was on his way. Counting these two members, the House would consist of two hundred and thirty members, and it would of course take one hundred and sixteen to make a quorum.

“The Chair stated that he had been informed by the clerk that one hundred and fourteen were a quorum. The clerk being permitted to explain, said that including the two members from Wisconsin there would be two hundred and thirty members, but there *were three vacancies to be deducted*. This being done, one hundred and fourteen would constitute a quorum.

“Mr. Jones denied that the vacant districts were to be deducted.

“Mr. Duer contended that the vacant districts ought not to be included in determining the number of which the House consisted, and that none ought to be taken into account but those actually elected and returned.”

The chair ruled that the vacant districts were *to be included* in the account.

It will thus be seen that upon that day, including the two members from Wisconsin, the House would have been composed of two hundred and thirty members, including three vacancies; and excluding the three vacancies, that is, seats for which members *were not chosen*, the House would have been composed of two hundred and twenty-seven members, and one hundred and fourteen would have, with this construction, been a quorum.

The point was here raised expressly that the vacancies should not be counted in estimating a quorum, and it was decided that they should be.

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Cushing's Law and Practice of Legislative Assemblies, 100:

“When the number of which an Assembly may consist at any given time is fixed by the Constitution, and an aliquot proportion of such an Assembly is required in order to constitute a quorum, the number of which such Assembly *may consist*, and not the number of which it does in fact consist at the time in question, is the number of the Assembly, and the number necessary to constitute a quorum is to be reckoned accordingly.” J. of H., VI., 274-395; J. of H., VII., 214.

“Thus, in the Senate of the United States to which, by the Constitution, each State in the Union may elect two members, and which may consequently consist of two members from each State, the quorum is a majority of that number, whether the States have all exercised their constitutional right or not.” J. of S., 32d Congressional Globe; Congressional Globe, X., 1.

“So in the second branch of Congress, in which, by the Constitution, the whole number of Representatives of which the House may consist, is fixed by the last appointment, increased by the number of members to which newly-admitted States may be entitled, the quorum is a majority of the whole number, including the number to which such new States may be entitled, whether they have elected members or not, making no deduction on account of vacant districts.” J. of H., 30th Congress, 1st Session, 877; Congressional Globe, 18-821.

In examining this question, I have given citations showing legislative practice. This is a question of constitutional law. The action of Legislative Assemblies, and especially the popular branch, is not authority in the legal sense of that word, that is, the authority which attends a judicial decision. It is seldom a safe criterion, and I should not hesitate to depart from it if I thought it wrong. The question here is an original one.

The judicial decisions in all the States whose courts have passed upon the subject, so far as I have been able to obtain them, define a quorum to be a majority of all the members that *may* be elected, including casual vacancies.

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Section 12, Article III, of the Constitution of Illinois, requires that “two-thirds of each House shall constitute a quorum,” and “the Senate shall consist of twenty-five members.”

In examining the Constitution as to what constituted a quorum of the Senate under these constitutional provisions, the Supreme Court of Illinois, in the case of *People vs. Hatch*, 33d Ill., 130-159, held it to be 17.

Constitution of Maine.—“The Senate shall consist of not less than twenty nor more than thirty-one members elected at the same time as the Representatives.”

“A majority of each House shall constitute a quorum to do business.”

In 6th Greenleaf, 515, the court held a “Senate cannot exist for the purpose of doing business, unless composed of eleven Senators at least, and such Senate can act only by vote, and decide only by the power of a major of the constitutional quorum.”

If such a construction was given to this clause in our Constitution as would permit the word House to be modified in its meaning by casual circumstances resulting in vacancies, such a result is possible as would vest the entire powers of the Legislative Department of the government in less than one-third of the members for which the Constitution provides.

There is as much reason under our Constitution for ruling that the term House means that members present, whether they be three or six, as there is for deciding that vacancies should be deducted where there are vacancies from death, resignation, or a failure to elect, when there has been no opportunity afforded to elect.

The meaning of the word “House,” as used in the clause of the Constitution under consideration, does not depend on such contingencies. It has a fixed meaning under all circumstances, which is, the entire number of which it *may be composed*, and a constitutional quorum must be a majority of that number.

It is, therefore, my opinion, upon the facts submitted in your

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communication and upon the authorities and precedents cited, that twelve Senators did not constitute a quorum to do business; and hence, that there was no Senate within the meaning of this clause of the Constitution, and that “a Legislature of the State of Florida, consisting of a Senate and Assembly, vested with the legislative authority of the State,” did not convene in extraordinary session under your proclamation of November 3, 1868.

As your Excellency does not require an opinion upon the points submitted in your second question, if a negative reply is returned to the first, having made such a reply, I do not consider the second question.

JAMES D. WESTCOTT, JR.,
Associate-Justice Supreme Court.

Opinion of E. M. RANDALL, C. J., in reply to the letter of the Governor, of November 9, 1868:

TO HIS EXCELLENCY, the Governor:

As pertinent to the first question proposed by the Governor, and fully embraced in its scope, it is deemed proper to give the result of our examination of authorities and our conclusions therefrom, based upon the facts as stated in his communication and in the documents presented herewith, upon the important question as to what constitutes an effective impeachment and suspension from office under the Constitution. In view of its importance, we have no hesitation in doing so, and in view of the further fact that we find no actually conflicting decisions or varying precedents.

Concurring fully in the views expressed by Justice Westcott, the following are respectfully submitted, with the promise that the rules which have governed courts and deliberative bodies, through a long series of years, are much more satisfactory to ourselves than our own speculations and first impressions.

Opinion of Randall, C. J.—Quorum—Impeachment.

I. "An impeachment before the Lords by the Commons of Great Britain, *in Parliament*, is a prosecution of the already known and established law, and has been frequently put in practice; *being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom.*" Blackstone's Com., Chap. XIX., 259; 1 Hale, P. C., 150.

Rawle on the Constitution, Chap. XXI, says, after quoting the provisions of the Constitution on the subject: "Impeachments are thus introduced as a known definite term, and we must have recourse to the common law of England for the definition of the term. In England, the practice of impeachments *by the House of Commons before the House of Lords* has existed from very ancient times. That branch of the Legislature which represents the people, brings the charge before the other branch." Burrill's Law Dict., title Impeachment, says, to impeach is *to exhibit* articles of accusation against a public officer *before a competent tribunal.*

Macaulay, referring to the impeachment of Warren Hastings, says: "At length the House, having agreed to twenty articles of charge, directed Burke *to go before the Lords and to impeach* the late Governor-General of high crimes and misdemeanors."

"Under the Constitution and laws of the United States, an impeachment may be described to be a written accusation, by the H. of R. *to the Senate*, against an officer. The mode of proceeding in the institution of an impeachment is as follows:

"When a person who may be legally impeached has been guilty, or is supposed to be guilty, of some malversation in office, a resolution is generally brought forward by a member of the House of Representatives, either to accuse the party or for a committee of inquiry. If the committee report adversely to the party accused, they give a statement of the charges, and recommend *that he be impeached*; when the resolution is adopted by the House, a committee is appointed *to impeach the party at the*

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bar of the Senate, and to state that the articles of impeachment will be exhibited in due time, and make good before the Senate and to demand that the Senate take order for the appearance of the party to answer to the impeachment. The House then agree upon the articles of impeachment, and they are presented to the Senate by a committee appointed by the House to prosecute; the Senate then issues process summoning the party to appear at a given day before them to answer the articles." Bouvier's Law Dict., title Impeachment.

On the 5th day of January, 1804, Mr. Randolph demanded an inquiry by the House of Representatives, of which he was a member, into the official conduct of Samuel Chase, a Justice of the Supreme Court of the United States, and introduced a resolution to appoint a committee for that purpose. The resolution was passed, a committee appointed, and a report, made subsequently, concluded with a resolution "that Samuel Chase, Esq., an Associate Justice of the Supreme Court, *be impeached* of high crimes and misdemeanors." This report was accompanied by a great mass of printed documents and depositions, and on the 6th of March the resolution was adopted by the House; "whereupon it was ordered that Mr. Randolph and Mr. Early be appointed a committee *to go to the Senate, and at the bar thereof*, in the name of the House of Representatives and of all the people of the United States, *to impeach* Samuel Chase, an Associate Justice, &c., of high crimes and misdemanors."

In the case of Judge Peck, in 1826, similar proceedings were had in the House, and the report of the committee concluded as follows: "That in consequence of the evidence collected by them, in virtue of the powers with which they have been invested by the House, and which is hereunto subjoined, they are of opinion that James H. Peck, Judge of the District Court, &c., *be impeached* of high crimes and misdemeanors." Whereupon a resolution was adopted in the precise words used in the case of Judge Chase, and thereupon the House "ordered that a committee *go to the Senate, and at the bar thereof*, in the name of the

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House, &c., *to impeach* James H. Peck, Judge, &c., of high crimes and misdemeanors in office.”

In the case of Andrew Johnson, President, precisely similar preliminary proceedings were had in the House, and on the report of the committee, the House “*Resolved*, That Andrew Johnson, President of the United States, *be impeached* of high crimes and misdemeanors in office.” Thereupon a committee was directed *to go to the Senate, and at the bar thereof to impeach* Andrew Johnson, President, &c., of high crimes and misdemeanors in office,” and that a committee be appointed to prepare and report particular articles of impeachment.

In these cases, and in all others of which a record can be found, the journal of the Senate shows that the committee in each case appeared *at the bar of the Senate*, and announced that “in obedience to the order of the House of Representatives, *we appear before you, and in the name of the House of Representatives, &c., we do impeach*,” &c. Such has been the uniform course pursued in every case of impeachment by the House of Representatives, or the Assembly of any State, whenever an impeachment has been prosecuted.

It thus appears by ample precedent and authority, that an impeachment is not simply the adoption of a resolution *declaring that a party be impeached*, but that it is the *actual* announcement and declaration of impeachment *by the House* through its committee *at the bar of the Senate, to the Senate*, that it does thereby impeach the officer accused, which proceeding is at once recognized by the Senate.

The Assembly of Florida, on the 6th day of November, 1868, upon the declaration of a citizen, that Governor Reed has been guilty of crimes and misdemeanors, immediately “*Resolved*, That Harrison Reed, Governor of Florida, be, and HE IS HEREBY, impeached of high crimes and misdemeanors in office.” This was immediately followed, however, by a resolution that a committee of three be appointed *to go to the Senate, and at the bar thereof to impeach* Governor Reed, and subsequently a commit-

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tee reported that they had *proceeded to the bar of the Senate* AND IMPEACHED, as they were directed to do, Harrison Reed, &c.

And so it clearly appears that the Assembly deemed that an impeachment was not effective until an accusation should be actually declared before the Senate, which body alone is authorized to entertain it.

The process of impeachment is likened in the books to the proceedings by indictment in the courts of criminal jurisdiction, and it is unnecessary to say that no indictment is of any effect whatever until it is presented to the court in actual, open, and legal session, and received and filed therein.

In the light of the abundant precedents and authorities on the subject, under constitutional provisions precisely like our own in that respect, we cannot, in considering this case, so far deviate from established principles, rules and beaten paths as to recognize a declaratory resolution of the Assembly as constituting an effective impeachment, until the declaration of impeachment or the accusation be made to and at the bar of the only tribunal authorized by the Constitution to receive and act upon it.

II. It then becomes necessary to inquire whether the Senate of this State was in actual legal session, duly organized and competent to transact business of any kind; for unless this be the fact, and a constitutional quorum be present, it could do no business as a House of the Legislature, except to adjourn and to compel the attendance of absent members. There are authorities in point, viz.:

“There is a distinction between a corporate act to be done by a *definite* number of persons, and one to be performed by an *indefinite* number. In the first case, it is to be observed that a majority is necessary to constitute a quorum, and that *no act can be done unless a majority be present*; in the latter, a majority of any number of those who appear may act.” Angell and Ames on Corp., sec. 501-2.

“Where it is granted by charter that a corporation shall have

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so many aldermen and so many capital burgesses, and that when one of the latter shall die, depart, or be removed, another shall be elected in his place by the mayor and aldermen and other capital burgesses then surviving or remaining, or the greater part of them, the election must be made by a majority of the full members of aldermen and of capital burgesses; a mere majority of members of both bodies who happened to survive is not sufficient." *Rex. v. Whitaker*, 9 B and C, 648; 7 Cowen, 402.

"According to the authorities afforded by the English books relating to municipal corporations, there must be present at a corporate assembly, besides the President, a majority of each integral part, if composed of a *definite* number, and not merely a majority of the surviving or existing members of each class. Indeed, if there be not a surviving majority of the constitutional members, no corporate assembly, say those authorities, can be formed, and the functions of every meeting in which that class ought to participate are suspended." 4 T. R., 823; 6 do., 278; 4 East., 26; do., 307; Cowen's notes *ex-parte* Willcocks, 7 Cow., 410; 7 S. and R., 517; 9 Foster, 213; Angell and Ames on Corp., secs. 501, 506.

Barclay's Digest, p. 158, has a note in these words: "It was decided by the 37th Congress, to which several of the States had failed to send Representatives, that a majority of the members chosen constituted a quorum to do business." Journal I., 37, p. 117.

This may be a correct statement of the decision as made. Cushing cites numerous decisions of the House, showing more clearly the established rule. It is well known that the occasion referred to was that of the "secession" of several States, and the position assumed by Congress and the President was that those States had abandoned their several State organizations and that they were "without legal governments," and of consequence the Congressional Districts therein were abandoned and destroyed, and thus in point of fact, by diminishing the number of Congressional Districts, and the insurrectionary States not

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being entitled, in the then condition of affairs, to a representation in Congress, the number of Representatives necessary to form the Congress was reduced. This was the basis of the action referred to, and whatever action was had in the premises, was with reference to the then existing facts.

The Constitution of this State divides the State into twenty-four Senatorial districts. If by some great throe of the earth, the peninsular portion of the State were to be submerged, and thereby whole counties and districts actually destroyed, the number of Senatorial districts would be most assuredly reduced, and practically the number of Senators composing the Senate would be affected accordingly, and it would doubtless be considered a practical abolition of districts, which the “strong arm of the law” could not prevent. It is very seriously doubted, however, whether the resignation of seats by individual Senators, or the failure to elect by reason of a tie vote, or the death of a Senator, would have a similar effect. All precedents and authorities and sound logic forbid it.

But it may be said that the Constitution does not *expressly* establish the number of members of the Senate. The language used is, (Art. XVI., sec. 29 :) “There *shall be* twenty-four Senatorial Districts, which shall be as follows, * * * and each Senatorial District *shall be* entitled to one Senator.” Art. IV., sec. 4, says, “Senators shall be chosen for the term of four years. * * * The Senators elected at the first election from the Senatorial Districts designated by even numbers shall vacate their seats at the expiration of two years, and thereafter all Senators shall be elected for the term of four years, so that *one-half of the whole number* shall be elected biennially.” Now to what do the words “whole number” refer? The whole number of what? Section 8 of the same article says, “A *majority of each House shall constitute a quorum to do business*, but a smaller number may adjourn from day to day,” &c.

“Each House,” is understood to mean, the members of the Assembly and of the Senate, selected from certain specified dis-

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tricts (not a *part* of the districts,) *duly convened and organized*. The word "House" refers to a duly organized body. The members do not form a "House" while they are at their homes, or when pursuing their private business in New York or London, but only when duly organized. A stranger inquires how many members compose the Senate or Assembly? Where do we go to find the answer? to the Constitution? or must we go to the several counties and districts and ascertain who has died or resigned? And even then we must deduct the number of ascertained vacancies from "the whole number" mentioned in the Constitution. "The whole number" must surely mean the aggregate of all the members, as the same may be ascertained by reading that instrument. If the words "the whole number" were intended to mean an indefinite number less than the whole, we should have this singular paradox: *A majority of the whole of an unknown or indefinite number shall constitute a quorum.*"

But suppose we were to conclude that a majority of the whole number of members prescribed by the Constitution, might be construed to mean a majority of those only who might present evidence of their election. Even that, in the present case, would not lead to a result different from that which we reach by what we deem the proper construction, for in this case it appears that a Senator was elected in each of the twenty-four districts.

It appears of record that W. H. Kendrick was returned as elected to the Senate from the 23d district, Senators from all the other districts having been duly elected and sworn, and participated in the proceedings of that body. Mr. Kendrick's right to a seat being doubted, a committee was appointed to inquire into his eligibility, and on the 5th day of November, 1868, said committee made a report against his eligibility; but it does not appear that the Senate acted upon such report, and for aught that appears upon the journals, Mr. Kendrick may be entitled to his seat. At any rate he was *returned as elected* to the Senate by a majority of votes, by the same authority which de-

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terminated the election of the other Senators. In case of his eligibility being denied by the Senate, it has sometimes been held by legislative bodies that the person who received the next highest number of votes at the election would be entitled to the seat, to wit: *according* to the practice adopted by the Constitutional Convention, as well as by one of the Houses of the Legislature, at its late session, and by the Legislature of a neighboring State; and hence, if the rule of the House of Representatives of the XXXVIIth Congress is correctly stated, its application in the present case would not vary the result, if these precedents are good authority.

It cannot be seriously contended that a *resignation of Senators*, or their expulsion, can have the effect of creating a quorum to be composed of a less number than a majority of those *elected*.

Adopting such a rule, the resignation of all the Senators but three, or even one, would give to that insignificant number the power of a “majority of the whole number;” the twenty-four districts would all be represented in a single person who would control all the legislation of the State; raise or refuse to raise taxes; overrule the wishes of the people represented in the Assembly; override the veto of the Governor; try impeachment; convict the Governor and Lieutenant-Governor; pronounce them forever disqualified to hold offices, and vote himself governor as the successor of the Lieutenant-Governor; prorogue the Legislature on refusing to agree to an adjournment; refuse to order elections to fill vacancies; and whatever crimes and misdemeanors in office he might commit, could neither be expelled from his seat as Senator or impeached as Governor. This case is extreme, it is true, but nevertheless, legally possible upon the hypothesis suggested. The people of Florida have not adopted a Constitution which, by any plausible construction, may place the government thus at the mercy of a minority of the whole number of members of which either House is to be composed.

Chief-Justice Marshal, in the case of *Cohen vs. The State of*

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Virginia, 6 Wheaton, 390, says that a majority of the States may refuse to send Senators to Congress, and that the effect of this would be to *suspend* legislation; that a *minority* of the States cannot effect such an obstruction of the Government, but that a majority may, and rightfully, under the Constitution, because a *majority* of States or people may always, of right, change the form of the government. The whole theory and the strength of our form of government rests in the right of the majority, instead of the minority, to make and unmake laws.

According to the "Journals" accompanying the Governor's communication, there were not present at any time during the called session more than twelve Senators. We are of the opinion that that number is not a "majority of the whole number." That by the Constitution, a smaller number than a majority of the whole number may only "adjourn from day to day, and compel the attendance of absent members," and do not, therefore, constitute a duly organized Senate, capable of transacting any business whatever, save such as is mentioned in the Constitution, and as may be incident thereto in the process of organization. "A message from one House to the other cannot be received by the House to which it is sent; nor can an answer to a message be received by the House by which it is sent, unless a quorum is present." Cushing's Law and Practice of Legislative Assemblies, section 817.

We have seen that an impeachment is an accusation, duly made to a tribunal empowered to act upon it. The Senators present seem to have appreciated the situation, as, by the "Journals," it appears that they took no notice whatever of the proceedings in question.

We are, therefore, of the opinion that even upon the assumption that the proceeding of impeachment is not properly "legislative business," and that it may be presented at a called session, without the actually expressed consent of both Houses, there has not been an effective impeachment and suspension from the performance of official duties.

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It is unnecessary to express any opinion as to the *status* of the sitting members who are supposed to have vacated and abandoned their places by accepting other offices. When the question arises it will doubtless be decided according to the law by the proper tribunal.

Respectfully submitted.

E. M. RANDALL, C. J.

Opinion of Justice HART in response to the letter of the Governor, dated November 9, 1868.

In the matter of the inquiries made by the Governor “whether a Legislature of the State of Florida, consisting of a Senate and Assembly vested with the legislative authority of the State, has convened in Extraordinary Session under the proclamation of the Governor of November 3d, A. D. 1868,” &c.

After much careful study and consideration, my mind has reached the same conclusions as those of the other Justices, and I concur fully with them in the opinions which they have given. The authorities quoted by them will be found to be in point, and their conclusions drawn therefrom to be sound.

Our Constitution does not *in haec verba* provide that the Senate shall consist or be composed of twenty-four members, but it contains provisions that by every fair and reasonable intendment mean the same. It provides that the legislative authority of the State shall be vested in a Senate and Assembly; that there shall be twenty-four Senatorial Districts; and it creates, defines, and numbers them, and provides that each shall be entitled to one Senator; and it also provides that a majority of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day and compel the absent members. To hold that these provisions of the Constitution mean that Senators from seven or three of these Senatorial Districts may under some or any circumstances constitute the Senate, cannot be a correct and sound interpretation

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of the Constitution. All reasonable contingencies are provided for in the phrase, "A majority of each House shall constitute a quorum to do business," &c. Until a majority of the Assemblymen and Senators provided for by the Constitution assemble, there can be no Legislature. The decision of the House of Representatives of the thirty-seventh Congress is not in point; the facts and circumstances inducing it were wholly and materially different; and yet the most abstract part of it, as it has been quoted from a digest, sustains us, for twenty-four Senators had been chosen. No district had failed or refused to elect or choose a Senator.

A careful study of the Journals of the first Legislature under this Constitution will disclose the fact that both Houses have almost invariably made decisions which warrant our opinion.

I have searched in vain for precedents to sustain the theory that seven or three may constitute a quorum of either House. Never, until now, has any high functionary announced the doctrine that if a popular branch, in full quorum, goes to the bar of the Senate, by its committee or otherwise, to impeach the Executive, and finds but seven or three Senators there, it may, to that number, legitimately impeach the officer.

The Assembly has the sole power of impeachment; that is, it is the sole body clothed with authority to perform the several acts necessary to constitute impeachment; but it must perform them all before it can effect impeachment. The sending a committee to the Senate to impeach the officer has always in all the cases, heretofore, been deemed essential to constitute impeachment, and if the Senate is not there, the act is not complete.

I could proceed at more length, but the arguments of the Chief-Justice and of Associate-Justice Westcott are so conclusive that it seems unnecessary.

Respectfully submitted,

O. B. HART,
Associate-Justice Supreme Court.

Opinion rendered to the Governor—Election of United States Senator.

IN THE MATTER OF THE EXECUTIVE COMMUNICATION OF THE
28TH JANUARY, 1869.

1. The Senate of the United States is the exclusive judge of the election return and qualifications of its own members. Whether an election of a Senator by a State Legislature is in conformity with such regulations as are prescribed by Congress, or whether, for want of strict conformity therewith, it is illegal and void, are questions which this court has no jurisdiction to decide.

EXECUTIVE OFFICE,
TALLAHASSEE, Fla., January 28th, 1869. }

To the Hon. the Supreme Court:

I have the honor to inclose a copy of a resolution of the Legislature asking the opinion of your honorable body upon a question submitted, and to which your immediate reply is required.

Very respectfully, &c.,
HARRISON REED, Governor.

The resolution inclosed was as follows:

CONCURRENT RESOLUTION.

WHEREAS, Grave doubts exist as to the legality of the late election of Abijah Gilbert as United States Senator.

Therefore be it resolved by the Senate, the Assembly concurring. That His Excellency the Governor be requested to ask the opinion of the Supreme Court at once upon the legality of said election, and if the Supreme Court should decide that the election of said Abijah Gilbert was illegal and void, whether or not any election of United States Senator from and after this time, and during the present session of the Legislature, would be legal and valid.

To His Excellency Governor REED:

Your letter of yesterday covering a resolution of the Legislature requesting the opinion of this court upon the legality of the election of the Hon. Abijah Gilbert as Senator of the

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United States from Florida; and whether, if the Supreme Court should decide that such election was *illegal and void*, an election hereafter made at the present session of the Legislature would be legal and valid?

An Act of Congress approved July 25th, 1866, entitled "An Act to regulate the times and manner of holding elections for Senators in Congress," (Laws 39th Congress, 1st session, p. 243,) provides that the Legislature which shall be chosen next preceding the expiration of the time for which any Senator was elected to represent said State in Congress, shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress in the place of such Senator so going out of office in the following manner: Each House shall openly by a *viva voce* vote of each member present name one person for Senator, and the name of the person so voted for who shall have a majority of the whole number of votes cast in each House shall be entered on the Journal of each House by the Clerk or Secretary thereof; but if either House shall fail to give such majority to any person on said day, that fact shall be entered on the Journal. At twelve o'clock M., of the day following, the members of the two Houses shall convene in joint assembly, and the Journal of each House shall be read, and the person who shall have received a majority of all the votes in *each* House shall be declared elected; but if the same person shall not have received a majority of the votes in each House, or if *either* House shall have failed to take proceedings as required, the Joint Assembly shall then proceed to choose by a *viva voce* vote of each member present a person for the purpose aforesaid, and the person having a majority of all the votes of said Joint Assembly (a majority of all the members elected to both Houses being present and voting) shall be declared duly elected; and in case no person shall receive such majority on the first day, the Joint Assembly shall meet at twelve o'clock M. of each succeeding day during the session of the Legislature, and take at least one vote until a Senator be elected.

Election of United States Senator—Opinion of Court.

No statement of facts is presented to us, but it is probably expected that we shall examine the Journals of the two Houses of the Legislature for the purpose of ascertaining what steps have been taken in reference to the election of a Senator, in place of the Senator whose term will expire on the 4th day of March next.

Protesting that the questions involved in the inquiry are not matters of judicial cognizance, and that the "opinion" of this court is binding upon no person, the matter being purely of legislative interpretation, and adjudication, yet because the Constitution *requires* the court to give opinions "upon any point of law," when *required* by the Governor, we are constrained to comply with the *requirements* of the Constitution.

As to the facts, then, relating to the election of Mr. Gilbert as Senator, we do not find that on the second Tuesday after the organization of the Legislature at its session commencing on the 8th day of June last, either House, openly by a *viva voce* vote of each member present, named any person for Senator of the United States in place of a Senator whose term of office was about to expire. Two persons were so voted for to fill supposed vacancies, but no votes were given to fill the term commencing on the 4th of March next. Subsequently a Joint Convention of the two Houses of the Legislature, without the previous separate action of the House, elected Mr. Gilbert for the term commencing in March next. It appears to us, therefore, that such election was irregular, but it is out of our power to *decide* that the election was "illegal and void," that question being exclusively for the Senate of the United States.

It is within the power of the Senate of the United States to regard the provisions of the act of Congress as directory, and to conclude that the Legislature of the State has expressed its will, and that the constituency of Mr. Gilbert desire him as their Representative; and that while in point of fact the election may not have taken place upon the day, and in strict conformity with the statutes, yet that it was a fair expression of

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the power in whom was vested the duty of selection. In the very nature of things there is nothing before us which can enable us to determine the question of its validity.

We may say whether the requirements of the law have been complied with, but we can not say whether the Senate will overlook this or determine that it was necessary. If the Senate determine that the election was valid, that is final, but until it is determined, its validity will remain an open question; and without a knowledge of the future we cannot answer the inquiry.

An election at a subsequent day of the present session, no Joint Assembly having been held on the day succeeding the vote taken in the Legislative Assembly, may stand upon similar grounds as to irregularity; neither being in *strict* conformity with law, the Senate might admit or refuse to admit either.

For the court.

E. M. RANDALL, C. J.

SUPREME COURT OF FLORIDA,
TALLAHASSEE, January 29th, 1869.

IN THE MATTER OF THE EXECUTIVE COMMUNICATION OF JAN-
UARY 29TH, 1869.

1. The provision of the Constitution, that the salaries of officers shall be payable quarterly, does not refer to the "pay" of members of the Legislature; their "pay" may be drawn at such time as the Legislature may, by law, determine.

EXECUTIVE OFFICE, }
TALLAHASSEE, Fla., January 29, 1869. }

To the Hon. the Supreme Court:

The Constitution, Article XVI, section 4, says: "The pay of the members of the Senate and House of Representatives shall be \$500 per annum," &c. Section 6 says: "The salary of each officer shall be payable quarterly upon his own requisition."

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Is the salary of members of the Legislature payable monthly, quarterly, or yearly? Is it payable in advance or at the close of the period?

An early opinion is required for the guidance of the Executive Department.

Very respectfully, your obedient servant,

HARRISON REED, Governor.

To His Excellency HARRISON REED, Governor:

Your communication of the 29th inst. is received, wherein you require the opinion of the court upon the following questions: Is the salary of members of the Legislature payable monthly, quarterly, or yearly? Is it payable in advance, or at the close of the period?

The portions of the Constitution relating to the subject are not entirely free from doubt as to their true meaning, and the members of this court are not of the same opinion in every respect in regard to their interpretation. A majority of the justices, however, have come to the following conclusions:

Section 2 of Article IV. reads as follows: "The sessions of the Legislature shall be annual; the first session on the second Monday of June, A. D. 1868, and thereafter on the first Tuesday after the first Monday of January, commencing in the year A. D. 1869. The Governor may in the interim convene the same in extra session by his proclamation."

Section 3 is as follows: "The members of the Assembly shall be chosen biennially, those of the first Legislature on the first Monday, Tuesday, and Wednesday of May, A. D. 1868, and thereafter on the first Tuesday after the first Monday of November, commencing with the year A. D. 1870.

From these sections we infer that the legislative year is to be held to commence with the day of the annual meeting of the Legislature, and to end on the day fixed for the next annual meeting of that body.

Section 4 of Article XVI, provides that the "*salaries*" of the

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Governor, Lieutenant-Governor, Justices of the Supreme Court, Circuit Judges, and Cabinet *officers* shall be certain fixed sums; that the "*pay*" of the members of the Legislature shall be five hundred dollars per annum, and ten cents per mile; and all other officers of the State shall be paid by fees; and section 6 says, "The *salary* of each *officer* shall be payable quarterly upon his own requisition."

Are members of the Legislature *officers* within the meaning of the Constitution? The Constitution of the United States, Article I., section 6, says, "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office, * * * and no person holding *any office* under the United States shall be a member of either House during his continuance *in office*." The Houses of Congress have, on several occasions, decided, and we believe invariably, that members of Congress were not officers in the true sense of the word. It has also been so held by the Legislature and courts of various States and of this State, in reference to members of Legislatures and State Conventions.

Our Constitution speaks of Senators vacating their "*seats*," not their "*offices*." It says, the "*salary*" of certain officers shall be a certain sum, and that the "*salary*" of each "*officer*" shall be payable quarterly; and in regard to the compensation of members of the Legislature, in the same section which provides the amount of salaries, it says, not "*salaries*," but the "*pay*" of members of the Senate, &c., shall be five hundred dollars per annum and mileage.

The provision that the salary of each officer shall be payable quarterly cannot apply to members of the Legislature, because the "*pay*," including *mileage*, renders the sum they may be entitled to receive indefinite. It certainly cannot be held that they are to draw their mileage quarterly.

The words "all *other officers*," in the fourth section, following the enumeration of several officers and their *salaries*, and members of the Legislature and their *pay*," refers immediately to

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the *officers* named, and not to members of the Houses. The words or terms “salary” and “pay,” refer the one to the “officers” mentioned, and the other to the “members.”

The duties of the several “officers” of the State are constant; each may be called upon at any moment to perform the duties of his position. Members of the Legislature have no duties to perform as officers independently of other members or officers, but act only when assembled pursuant to law, and their duties may be said to begin and to end with *voting* upon questions submitted. The amount of their “pay” does not depend upon their performing six or sixty days service. They are required to attend an annual session in January, and *may* be convened on extraordinary occasions by the Governor, and on such occasions are entitled to additional pay by way of mileage; and this again illustrates the suggestion that they are not included among the officers who draw their salaries quarterly, the amount of their pay as mileage not being susceptible of accurate calculation because the number of occasions on which they may be convened cannot be anticipated.

We therefore conclude that the provision of the Constitution entitling members of the Legislature to a given amount of *pay* per annum means that they are entitled to so much for each legislative year; that the legislative year for 1868 commenced on the day fixed for the annual session in that year, and that the legislative year for 1869 commenced on the day of the annual session for that year.

We are therefore of the opinion that the “*pay*” of members not being included in the term *salary*, and therefore not being required to be drawn quarterly, it is within the province of the Legislature to prescribe the time of its payment.

For the court.

Respectfully submitted,

O. B. HART, Associate Justice.

NOTE.—The head note in this case was prepared in accordance with the statute by the Judge delivering the opinion.—REP’R.

Pay of Members of the Legislature—Dissenting Opinion of Westcott, J.

WESTCOTT, J., dissented from the foregoing views in the letter following:

His Excellency, HARRISON REED, Governor of Florida:

SIR: Your communication of January 29th has been received by the court, and I regret that I cannot agree with the conclusion to which a majority of the court has arrived.

The answer to the inquiries made, which I need not repeat, involves the consideration and construction of sections 1 and 2, Article IV., section 6, Article XVI., and a portion of section 4, Article XVI., of the Constitution of this State. These sections, so far as they relate to the subject of inquiry, are as follows:

“The legislative authority of this State shall be vested in a Senate and Assembly, which shall be designated the Legislature of the State of Florida, and the sessions thereof shall be held at the seat of government of the State.”

“The sessions of the Legislature shall be annual, the first session on the second Monday of June, A. D. 1868, and thereafter on the first Tuesday after the first Monday of January, commencing in the year A. D. 1869.”

“The pay of the members of the Senate and House of Representatives shall be five hundred dollars per annum, and in addition thereto ten cents per mile for each mile traveled from their respective places of residence to the Capital, and the same to return, such distance to be estimated by the shortest general thoroughfare.”

“The salary of each officer shall be payable quarterly upon his own requisition.”

In the light of the authorities upon the subject there may be some difference of opinion as to whether members of the Legislature are officers within the meaning of that term as used in Article VI., section 16, of the Constitution of this State, which is the clause last above mentioned. I cannot see, though, how this is a premise from which the conclusion of the court follows. Suppose they are not officers within the meaning of that term as

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used in sections 4 and 6 of Article XVI. of the Constitution, does it follow that they can appropriate one thousand dollars for their pay for eight months when the Constitution provides that “the pay of the members of the Senate and House of Representatives shall be five hundred dollars *per annum*,” that is, *through a year, a period of twelve months*? It is certainly obvious that no such consequence results. Their pay, whether they be “members” or “officers,” is limited. It makes no difference what they are.

But it is the opinion of a majority of the court that the members of the Legislature are entitled to five hundred dollars for each “*legislative year*,” that the legislative year for 1868 commenced on the day fixed for the “annual” session for that year, and that the legislative year for 1869 commenced on the day of the annual session for that year,” and that the members of the Legislature are entitled to the sum of five hundred dollars for the session held in 1868, and to five hundred dollars for the session of 1869; that what is due for 1869 can be paid upon an appropriation at the termination of the session of January, 1870, thus making the pay of the members of the Legislature, who in the view of the court commenced their legislative year in June, 1868, the sum of fifteen hundred dollars (\$1500) for the space of one year and eight months, or one thousand dollars for eight months.

I regret that I must dissent from this view.

While it is true that the second section of Article IV. requires that the sessions of the Legislature shall be annual, the first session on the second Monday of June, A. D., 1868, and thereafter commencing on a certain day in January, 1869, yet it does not follow that because two sessions of the Legislature are in fact held within the space of one year, that this clause in the Constitution, which proposes not to *create a legislative year as distinct from any other year, but solely to determine the time and number*

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of sessions the Legislature shall hold, should be held to fix the amount of *pay* that members are to receive; and especially is this true when we remember that there is a particular clause in the Constitution which was inserted for the express purpose of *fixing the pay*.

In my opinion the pay of the members of the Legislature must be determined by that clause in the Constitution which was inserted for the express purpose of fixing it, and the terms of which are not of doubtful signification, but which is, in very words, so plain that there is no necessity for referring to any other clause of the Constitution to aid us in coming to a proper conclusion as to its meaning.

Leaving, therefore, the consideration of section 2, Article IV., of the Constitution, the purpose of which is simply to prescribe the time at which the sessions of the Legislature are to be held, and which does not in my opinion propose to fix a distinct "legislative year" for the purpose of pay, I come to the consideration of section 4, Article XVI., of the Constitution, which was inserted for the express purpose of fixing the pay of members of the Legislature and the salaries of officers.

This section provides as follows (section 4): "The salary of the Governor of the State shall be five thousand dollars *per annum*; that of the Chief-Justice shall be four thousand five hundred dollars; that of each Associate Justice shall be four thousand dollars; that of each judge of the circuit court shall be three thousand five hundred dollars; that of the Lieut. Governor shall be two thousand five hundred dollars; that of each cabinet officer shall be three thousand dollars.

"The pay of the members of the Senate and House of Representatives shall be five hundred dollars per annum, and in addition thereto, ten cents per mile for each mile travelled from their respective places of residence to the capital, and the same to return."

Here we find an express provision, which in my judgment leaves the question without doubt.

Pay of Members of the Legislature—Dissenting Opinion of Westcott, J.

It is provided that the pay of the members of the Senate and House of Representatives shall be five hundred dollars *per annum*. What does this term "*per annum*" mean here? It will be noted that it occurs in a previous portion of the same section, wherein provision is made "that the salary of the Governor shall be five thousand dollars *per annum*," and it is obvious that the meaning of the words "*per annum*" in each connection mean precisely the same thing, and there is no reason in my judgment why we should look elsewhere to construct a new and different legislative year for purposes of pay; and especially is this so when the section to which you are referred is only in the Constitution to fix the number and time of the sessions of the Legislature, and has nothing to do with the pay of its members.

It is my opinion, therefore, that the pay of a member of the Legislature attaches and begins to run when he becomes subject to be called upon to perform legislative duties, in the same way that an officer's pay attaches upon his acceptance and qualification.

The mode of drawing it I am inclined to think may be fixed by the Legislature in such manner and at such time as is consistent with this view of the Constitution.

I am therefore of opinion that no act or series of acts, the operation of which is to pay a member of the Legislature anything beyond the sum of five hundred dollars within the space of one year from the time he is subject to be called upon to perform legislative duties, is constitutional.

I am aware of the fact that another department of the government has with an almost unanimous voice given a different construction to the Constitution, and if I had any reasonable doubt in the matter, I would follow their construction; but as I am without doubt in the premises I am constrained to express that opinion which I feel sure is correct.

Respectfully

JAMES D. WESTCOTT, JR.,

Associate Justice Supreme Court of Florida.

SUPREME COURT, Tallahassee, Fla., Feb. 1st, 1869.



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TO THE

TWELFTH VOLUME OF FLORIDA REPORTS

ACTS—See statutes construed.

ALIMONY—

1. *Ad interim* alimony, or alimony *pendente lite*, as well as the allowance of a sum to the wife to enable her to prosecute her suit, are given not as of strict right in the wife. It is a matter for the sound discretion of the court, 434.

2. If no order awarding alimony *pendente lite* or counsel fees is made until after a decree for divorce, such an order under the statute should not be then made unless the nature of the case makes it "fit, equitable, and just." 434.

3. Where the wife has brought her case to a hearing before such an order is made, no allowance, either for alimony or costs of counsel, should be made where the case from the evidence and the pleadings is one in which she had no reasonable ground of suit. *Underwood vs. Underwood*, 434.

4. Where, upon the face of the bill, there is not sufficient alleged to justify a decree of divorce, the court should not, at any stage of the proceedings, allow to the wife means to compensate counsel to prosecute her suit. A *prima facie* case must at least be made in her pleadings before such an order is passed, 450.

5. Permanent alimony is a continuous allotment of sums payable at regular periods. A gross sum of money given absolutely in full satisfaction, or a specific proportion of the husband's estate, cannot be given absolutely in full satisfaction of alimony. 450.

6. Before a decree for permanent alimony is passed, there should be testimony sufficient to form an intelligent basis for such an order. There should be such testimony as would enable the court, with reasonable certainty, to do justice alike to the parties. *Phelan vs. Phelan*, 450.

AMENDMENT—

1. The proceeding by information, in the nature of a *quo warranto*, is essentially a civil proceeding, and the pleadings in it are as much subject to amendment as they are in ordinary civil actions. It is criminal only in form. *State of Florida vs. Wm. H. Gleason*, 191.

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AMENDMENT—(Continued.)

2. Where an attachment bond does not appear upon its face to be executed by the plaintiffs, their agent or attorney, as required by statute, the omission cannot be remedied by amendment. *Work & Son vs. Titus*, 628.

ANTECEDENT GRUDGE—

1. Where an antecedent grudge has been proved, and there is no satisfactory evidence to show that the wicked purpose had been abandoned, it must be clearly shown to the court and jury that the provocation was great in order to warrant them in finding that the killing was on the recent provocation, and not on the old grudge. *Holland vs. The State*, 118. (See title Criminal Law.)

APPEAL—

1. Where a bill is taken *pro confesso*, and a final decree is passed under the statute, an appeal lies to this court under the practice in this State, and in all cases such an appeal opens for the consideration of this court the record prior to the default, 395.

2. Where there is no equity in the bill, or the case made shows a plain remedy at law, this court, in an appeal of this character, should direct the bill to be dismissed, though these questions are not raised in the pleadings. *Freeman vs. Timanus*, 393.

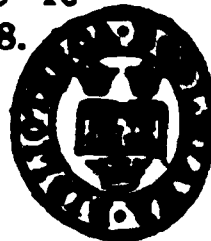
3. Under the statutes regulating appeals in chancery from final or interlocutory decrees, a bond is not necessary to perfect an appeal. The only result attending a failure to give bond under the statutes is, that the appeal does not operate as a supersedeas, 416.

4. Where an appeal is prosecuted from an interlocutory order or decree in chancery, under the act of 1853, if the bond is in a sufficient amount and so conditioned as to secure the appellee fully in his rights, as well as for all damages in the event the decree of the court below is affirmed, either in whole or in part, it is a sufficient bond. *Kilbee & Barnes vs. Myrick*. 416.

5. Where, upon bill filed, a decree of divorce *a vinculo matrimonii*, and of reference to master to report as to allowance for alimony, is passed upon the consent and agreement of the parties, an appeal from the order confirming the report when made, and fixing the alimony, opens for consideration under the statute of this State the decree of divorce, and though the parties may not desire to disturb the decree of divorce, it will be reversed if improperly granted. *Underwood vs. Underwood*, 434.

6. It is the imperative duty of the court to dismiss an appeal upon an application based on the production of the certificate of the clerk of the circuit court that an appeal has been obtained and a bond given, the copy of the proceedings in the court below not being filed, unless the party in default show some good cause for not having complied with the statute, 493.

7. What is "good cause" for an omission to file a copy of the record of proceedings with the clerk of the Supreme Court, after taking an ap-



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peal, is matter to be addressed to the sound discretion and judgment of the court, 493.

8. Neglect to file the proceedings of the circuit court because the appellant or his counsel had reason to believe that no causes would be heard at the commencement of the term, is not "good cause" for the omission, the law requiring the appellant to file the papers with the clerk of the Supreme Court on the first day of the term. *Rain vs. Thomas*, 493.

(See titles Error, Practice.)

APPROPRIATION OF PAYMENTS—

1. A bank holds the notes of R., for securing which R. pledged a quantity of cotton which was left in his possession to be disposed of by the bank to meet the notes. R. subsequently sold the cotton and deposited the proceeds in the bank to his own credit in his bank account, and afterwards drew out by his checks all the funds so deposited without applying or directing the bank to apply such deposits to the payment or satisfaction of the notes; *held*: that though there were balances to his credit from time to time sufficient to cover the amount of the notes after they became due, yet, as he neglected to appropriate such balances to the payment of the notes, but drew them out, it is too late to demand the extinguishment of the notes by the application of such balances, 518.

2. Deposits in a bank to account of the depositor cannot be considered as *payments* made upon notes owing to the bank, though the bank may hold a sufficient amount of such deposits to meet the indebtedness; but its right to do so is at its option, 518.

The subject of "appropriation of payments" incidentally considered and leading authorities referred to. *Randall vs. Pettes*, 518.

ATTACHMENT—

1. An attachment bond executed by an attorney at law, in his own name, binding himself and not his principal, and signed by two good and sufficient securities, is sufficient under the statute to sustain the writ of attachment, 144.

2. The third rule of court does not conflict with the statute authorizing an attorney at law to sign an attachment bond binding himself and not his principal, 144.

3. The notice required in attachment suits is to enable defendant to appear and plead to the merits of the cause, and not to appear and contest the validity of the writ, and the only limitation to the time of notice is, that no judgment can be rendered before satisfactory proof of such notice, 144.

4. To obtain the writ of attachment it is only necessary to file the proper affidavit and bond with the clerk—a praecipe is not required by law. The time of filing the affidavit for attachment is made by statute, for all legal purposes, the date of the commencement of the suit. *Simpson & Co. vs. Knight & Fraser*, 144.

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ATTACHMENT—(Continued.)

5. The general purpose and intent of the attachment laws is to give the creditor protection and security whenever the debtor is committing certain enumerated acts of fraud, or he is in such a situation as either endangers the debt or impairs the remedy for its collection. They should not be so construed as to prohibit the debtor under all circumstances from engaging in every legitimate species of trade beyond the confines of State jurisdiction. 589.

6. The statute authorizes an attachment whenever the debtor is actually removing his property out of the State. *Held*, That although a case in which there is no bad intent, the transaction is fair, the amount of property being removed in comparison with what remains is small, the debtor is solvent, and the debt is not endangered, was within the letter, yet it was not within the spirit or true meaning of the statute. *Haber & Co. vs. Nassitts*, 589.

7. A party suing out an attachment describes himself in the affidavit as agent of the plaintiffs in the action. In executing the bond required under the statute he fails to describe himself as agent of the plaintiffs, "the bond purporting to have been given by him in person," omitting any statement to the effect that he was the agent or attorney, and conditioned to be void if in case the attachment was dissolved the plaintiffs in the suit (naming them) would pay all damages and costs the defendant might sustain in consequence of improperly suing out the same.

Held: That the bond is fatally defective, it not appearing therein that it was executed by the plaintiffs, their agent or attorney; that the principal in the bond being described in the affidavit as agent of the plaintiffs is not sufficient to cure the defect, and that the omission cannot be remedied by amendment. *Work & Son vs. Titus*. 628.

ATTORNEY—

1. Courts by common law had no power to admit an attorney or counsellor to practice, 278.

2. Courts by common law had the power to disbar attorneys after admission when guilty of such conduct as would justify it, 278.

3. The statutes of this State regulating the admission of attorneys do not affect the power of courts to disbar an attorney. Such power is essential to the maintenance of their own dignity and the respectability of their officers, 278.

4. Where it is intended to apply to the court to have an attorney disbarred, the proper course of proceeding is to present the charge to the court, and it will direct a rule to show cause why the name of the attorney should not be stricken from the roll, if a case proper for the action of the court be presented; this rule is awarded, served, and returned, and the court hears and determines the matter according to law, 278.

5. A regular complaint against an attorney ought not to be received and acted on unless made on oath, and the charge should be specific and

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particular, so that the officer may be aware of the precise nature of the accusation he is to meet, 278.

6. The county courts of this State have the power to disbar an attorney and to deny him the rights of an officer of that court, but their judgment cannot extend beyond a denial of the privileges of an attorney in that court. It does not directly affect his rights in other courts, 278.

7. While it is essential that the authority of the courts should remain unimpaired in the exercise of this great and peculiar power, it is not the less so that the rights of the officer should be protected against a wrongful exercise of it, and this court will interpose when the inferior court has decided erroneously on the testimony, and a plain case of wrong and injustice is brought to its attention, 278.

8. The appropriate remedy in a case of this character is by a writ of mandamus, rather than an appeal from the order of the inferior court, or writ of error. *State ex rel., &c., vs. Wm. Kirke*, 278.

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BAILMENT—

1. Where a slave was injured in the act of performing an improper order, or one not warranted by the contract under which he was hired, the hirer is liable for all the consequences of the injury, 497.

2. But the injury must have been the immediate consequence of the improper employment; or have been received while so improperly employed, or have grown out of the peculiar hazard of the employment; and if an injury occur subsequently on account of the carelessness or heedlessness of the slave, and without the fault of the hirer, the hirer will not be liable for the consequences of the injury. *P. & G. R. R. Co. vs. Nash*, 497.

BILL OF EXCEPTIONS—

1. Where a party may have the benefit of a bill of exceptions, but neglects to avail himself of it, a Court of Equity will not step in to perform the legitimate office of such bill of exceptions. *Dibble vs. Truluck*, 185.

2. In the absence of a bill of exceptions showing the testimony given on the trial in the Circuit Court, this court will presume that there was adequate evidence before the jury to support the verdict. *Frisbee and Johnson vs. Timanus*, 537.

3. General objections to questions addressed to witnesses, without stating the precise ground of objection, are vague and nugatory, and if entitled to weight anywhere are without weight before an appellate court. If any grounds of objection were stated in the court below, the bill of exceptions should disclose them, and when they do not so appear this court will not pass upon them when urged here by way of argument or embodied in the assignment of errors. *Gladden vs. The State*, 562.

BOND—

1. An attachment bond executed by an attorney at law, in his own name, binding himself and not his principal, and signed by two good and

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sufficient securities, is sufficient under the statute to sustain the writ of attachment, 144.

2. The third rule of Court does not conflict with the statute authorizing an attorney at law to sign an attachment bond binding himself and not his principal. *Simpson & Co. vs. Knight et al.*, 144.

3. A party suing out an attachment describes himself in the affidavit as agent of the plaintiffs in the action. In executing the bond required under the statute he fails to describe himself as agent of the plaintiffs, "the bond purporting to have been given by him in person," omitting any statement to the effect that he was the agent or attorney, and conditioned to be void if in case the attachment was dissolved the plaintiffs in the suit (naming them) would pay all damages and costs the defendant might sustain in consequence of improperly suing out the same.

Held: That the bond is fatally defective, it not appearing therein that it was executed by the plaintiffs, their agent or attorney; that the principal in the bond being described in the affidavit as agent of the plaintiffs is not sufficient to cure the defect, and that the omission cannot be remedied by amendment. *Work & Son vs. Titus*, 628.

CARRYING SECRET ARMS—See Criminal Law, 11.

CERTIORARI—

1. Deficiencies in the record cannot be taken advantage of by motion to dismiss the appeal. If the appellee desires to remedy the deficiency, he must suggest the diminution and move for a *certiorari* under the rules. *Underwood vs. Underwood*, 432.

(See Equity, 4.)

CHANCERY—See Equity and Practice in Equity.

CHARGE OF COURT—

1. It is within the province of the court, after defining the different grades of homicide, to restrict its charges to points of law arising upon the facts, being careful to give such instructions as cover all reasonable deductions, 564.

9. The court, after charging as to the different grades of homicide and the requisite evidence to support them, is not bound on the motion of either party to repeat the same charge in substance, though varied in terms. *Gladden vs. State*, 563.

(See Practice and Criminal Law.)

CIVIL RIGHTS—

1. In a State where equal rights are guaranteed to all by fundamental law, the act of Congress entitled "An Act to protect all persons in their civil rights and furnish the means of their vindication," is inoperative to permit a party, after a full and fair hearing, to question the correctness of judicial decisions affecting his rights, and by his own act transferring the cause; such a doctrine would destroy all power of State courts, and it is the duty of the State court to set aside the petition, and proceed to

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hear and determine the case according to the principles of law. *State vs. Wm. H. Gleason*, 191.

CONSTITUTIONAL LAW—

1. The fifth section of the 6th article of the Constitution of this State provides that "the Supreme Court shall have appellate jurisdiction in all cases in equity, also in all cases of law in which is involved the title to, or right of possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand or the value of the property in controversy exceeds three hundred dollars; also in all other cases not included in the general subdivisions of law and equity; also in all questions of law alone, in all criminal cases in which the offense charged amounts to felony. The court shall have power to issue writs of *mandamus*, *certiorari*, prohibition, *quo warranto*, *habeas corpus*; and also all writs necessary or proper to the complete exercise of its appellate jurisdiction." Held that the jurisdiction of this court is two-fold—appellate jurisdiction proper, with power to issue all writs necessary to its full exercise, and original jurisdiction to issue the writs specified where they are the appropriate remedies, 190.

2. A grant of power to issue a writ of *quo warranto* embraces and includes the proceeding by information in the nature of a *quo warranto*, this proceeding being civil in its essential incidents, and having in view the same object, 190.

3. A constitutional grant of power to issue a writ of *quo warranto*, can be exercised by this court without legislative action prescribing the mode and manner of its exercise, and the court will discharge its duty by a course conformable to the principles of the common law, in the absence of legislation upon the subject, 190.

4. The Legislature of this State has no authority to hear and determine a case involving the right and title to the office of Lieutenant-Governor of this State. This is a power distinct from the right of the Senate to try an officer for crime upon articles of impeachment preferred by the Assembly. It is judicial in its character, and a matter solely within judicial cognizance. Nor is it a political question beyond the power of the courts to determine, 190.

5. In a State where equal rights are guaranteed to all by fundamental law, the act of Congress entitled "An Act to protect all persons in their civil rights and furnish the means of their vindication." is inoperative to permit a party, after a full and fair hearing, to question the correctness of judicial decisions affecting his rights, and by his own act transferring the cause; such a doctrine would destroy all power of State courts, and it is the duty of the State court to set aside the petition, and proceed to hear and determine the case according to the principles of law, 190.

6. A prosecution instituted in the name of and in behalf of the people of the State of Florida, is a substantial compliance with the constitutional requirement in section 2, article VI., viz.: "The style of all process shall

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be 'The State of Florida,' and all prosecutions shall be conducted in the name and by the authority of the same." It is sufficient, if it appears from the record that it is conducted by the authority of the State of Florida as distinct from the authority of any other power, 190.

7. The Constitution, until changed in some recognized legal mode, is as well a limit upon the power of the people as upon the departments of the government. The simple election by the people of a person to an office who has not the constitutional requisites for eligibility does not destroy the effect of the constitutional requirements. The fact that the party is eligible at the time the *case is tried* cannot modify the principle. He must have been so when elected. Nor is it necessary that there shall be a party contesting the office before this court can act. It acts upon the motion of the Attorney-General, 190.

8. The terms "registered voter," in section 22, article XVI., of the Constitution of the State, refer to the registration authorized by the 6th section, article XIV., of the Constitution. It did become operative as a requirement for eligibility to office before the Legislature had passed a registration law, and the constitutional requirement could be complied with.

9. The office of Lieutenant-Governor of this State being an office created by the Convention which framed the Constitution of this State, it is not controlled in such manner by the legislation of Congress authorizing the holding of such Convention, as makes the constitutional requisites for eligibility inoperative. Officers elected at the first election to fill the offices provided by the Constitution must be eligible according to its requirements. *State vs. Gleason*, 190.

10. A prosecution for crime must be conducted in the name and by the authority of the State of Florida, 272.

11. A judgment authorized by a statute which creates the debt upon which it is based, and which is entered in favor of a person whose suit or demand the defendant has not been summoned to answer, is void. *Ex Parte Wm. Nightingale*, 272.

12. Ordinance No. VIII of the Convention of 1865 applies to contracts made during the war of 1861-5, and by the terms of the ordinance, courts are "authorized to admit testimony as to the value of the property or consideration contemplated by the parties;" *held*: That the testimony must be confined to the value of the consideration at the time the contract was made. *Randall vs. Pettes*, 517.

13. Members of what is known as the "Secession Convention," were neither executive nor judicial officers of this State, within the meaning of these terms as used in Section 1, Article XVI., of the Constitution of this State. A person who was a member of such Convention, and signed the ordinance of secession, and who afterwards gave aid and comfort to the enemies of the United States, is not prohibited from holding any office,

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executive, legislative, or judicial, in this State. Executive Communication, 651.

14. Sec. 8, Art. IV., of the Constitution provides that "a majority of each *House* shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may compel the presence of absent members, in such manner and under such penalties as each House may prescribe."

The term "House" in this clause of the Constitution, when used in reference to the matter of quorum, means the entire number of which the Assembly or Senate *may be composed*. A quorum for the purpose of general legislation is not less than a majority of the whole number of which the "House" *may be composed*. Vacancies from death, resignation, or failure to elect, cannot be deducted in ascertaining a quorum, 653.

15. To constitute an impeachment so as to be effective under the Constitution to suspend the officer, the articles of impeachment must be presented to the Senate, and a constitutional quorum of the Senate must reside to decide. Executive Communication, 686.

16. The Senate of the United States is the exclusive judge of the election return and qualifications of its own members. Whether an election of a Senator by a State Legislature is in conformity with such regulations as are prescribed by Congress, or whether, for want of strict conformity therewith, it is illegal and void, are questions which this court has no jurisdiction to decide. Executive Communication, 686.

17. The provision of the Constitution, that the salaries of officers shall be payable quarterly, does not refer to the "pay" of members of the Legislature; their "pay" may be drawn at such time as the Legislature may by law determine. Executive Communication, 689.

CONTINUANCE—

1. The rules of law in granting continuances in civil and criminal cases are substantially the same, except so far as they are modified by the difference in proceeding. In criminal cases, however, the grounds for the motion should be scanned more closely than in civil causes, on account of superior temptation to delay, 562.

2. In a motion of this character much must be left to the tribunal before which the parties are. Circumstances occurring in its presence often indicate whether such motions are in good faith, and a writ of error will not be sustained on account of the refusal of the court to grant a continuance unless it is a plain and palpable instance of the arbitrary and oppressive exercise of the discretion necessarily vested by law, 562.

3. In application for a continuance it must be shown by affidavit that the witness has been duly served with a subpoena, or a satisfactory reason assigned for the omission, and when it is not served, and the time at which the subpoena is issued is not disclosed, nor the residence of the witness stated, so that this court can determine the propriety of the order of the

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court below in these respects, this court will not interfere. *Gladden vs. State of Florida*, 562.

CONTRACTS—

1. Ordinance No. VIII of the Convention of 1865 applies to contracts made during the war of 1861-5, and by the terms of the ordinance, courts are "authorized to admit testimony as to the value of the property or consideration contemplated by the parties;" *held*: that the testimony must be confined to the value of the consideration at the time the contract was made. *Randall vs. Pettes*, 517.

(See title Appropriation of Payments, 1, 2.)

COUNTY COURT—See title Attorney, 1, 2, 3, 4, 5, 6, 7, 8.

COURTS—

1. Both by the rule of the common law and by the statute of Florida, a Judge is precluded from sitting on the trial of any cause in which he may have a pecuniary interest. Whether under the second section of the Act of 1862, the defendant may waive the objection. *Query? Ochus vs. Hoyt*, 138.

2. The fifth section of the 6th article of the Constitution of this State provides that "the Supreme Court shall have appellate jurisdiction in all cases in equity, also in all cases of law in which is involved the title to, or right of possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand or the value of the property in controversy exceeds three hundred dollars; also in all other causes not included in the general subdivisions of law and equity; also in all questions of law alone; in all criminal cases in which the offense charged amounts to felony. The court shall have power to issue writs of *mandamus*, *certiorari*, prohibition, *quo warranto*, *habeas corpus* and also all writs necessary or proper to the complete exercise of its appellate jurisdiction." *Held*, that the jurisdiction of this court is two-fold—appellate jurisdiction proper, with power to issue all writs necessary to its full exercise, and original jurisdiction to issue the writs specified where they are the appropriate remedies, 190.

3. A grant of power to issue a writ of *quo warranto* embraces and includes the proceeding by information in the nature of a *quo warranto*, this proceeding being civil in its essential incidents, and having in view the same object, 190.

4. A constitutional grant of power to issue a writ of *quo warranto*, can be exercised by this court without legislative action prescribing the mode and manner of its exercise, and the court will discharge its duty by a course conformable to the principles of the common law, in the absence of legislation upon the subject. *State of Florida vs. Gleason*, 190.

5. Courts by common law had no power to admit an attorney or counsellor to practice, 278.

6. Courts by common law had the power to disbar attorneys after admission when guilty of such conduct as would justify it, 278.

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COURTS—(Continued.)

7. The county courts of this State have the power to disbar an attorney and to deny him the rights of an officer of that court, but their judgment cannot extend beyond a denial of the privilege of an attorney in that court. It does not directly affect his right in other courts, 278.

8. While it is essential that the authority of the courts should remain unimpaired in the exercise of this great and peculiar power, it is not the less so that the rights of the officer should be protected against a wrongful exercise of it, and this court will interpose when the inferior court has decided erroneously on the testimony, and a plain case of wrong and injustice is brought to its attention. *State vs. Wm. Kirke*, 278.

9. A judgment is a general lien upon real estate, and a court of law cannot control that general lien by directing execution of the judgment against specific portions of the property of the defendant in execution to the exclusion of other portions equally subject to the general lien, on account of equities claimed to exist in favor of a person not a party to the judgment or execution. *Clonts vs. Ritch*, 633.

(See Constitutional Law, Equity, Attorneys, Jurisdiction, Process.)

COVENANT—

The warranty contained in a bill of sale given for a negro, that he was to be a "slave for life," is not broken by the subsequent act of the Government, which abolished in the Southern States the institution of negro slavery. *Walker vs. Gatlin*, 1.

CRIMINAL LAW AND PRACTICE—

1. When the question of malice has arisen in cases of homicide, the matter for consideration is, whether the act was done with or without just cause or excuse. A wrongful act done intentionally, without just cause or excuse, is said to be done maliciously, 117.

2. The implication of malice arises in every instance of homicide and in every charge of murder, the fact of killing being first proved, the law will imply that it was done with malice, 117.

3. To rebut the implication of malice, all the circumstances of accident, necessity or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him, 117.

4. If the evidence proves a previous grudge or bad blood, or menaces, or expressions of vindictive feeling, or a former attempt on the part of the accused to do the deceased some great bodily harm, there can be but little hesitancy in declaring that the killing was done upon "express malice," unless it can be shown, that at the time of the killing, the accused was smarting under a recent and great provocation, calculated to arouse sudden and violent anger, 117.

5. The law implies from any deliberate and cruel act against another, however sudden; and if the natural consequence of the act would be the death of another, a court and jury may fairly infer that it was done with intent to kill such other person, and is, therefore, murder.

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An act is said to be deliberate within the meaning of the law when it is voluntarily done, 117.

6. The natural and necessary inference is, that a cruel act, wilfully done, without apparent excuse, is done "*malo animo*," in pursuance of a wrongful and injurious purpose *previously*, though perhaps suddenly formed, and if death ensues from such act, it is "a homicide with malice aforethought," which is the true definition of murder.

7. When from the evidence the jury are satisfied of the previous existence of malice in the slayer, its continuance down to the perpetration of the homicide must be presumed, unless there is evidence to rebut it and show the wicked purpose had been abandoned, 117.

8. When an antecedent grudge has been proved, and there is no satisfactory evidence to show that the wicked purpose had been abandoned, it must be clearly shown to the court and jury that the provocation was great, in order to warrant them in finding that the killing was on the recent provocation, and not on the old grudge, 117.

9. Whenever a dangerous weapon is used against an unarmed adversary, even upon reasonable provocation, the killing will be murder and not manslaughter, for the law implies from the use of a dangerous weapon that the intent was to kill, and not to fight on equal footing, 117.

10. There is no means by which an Appellate Court can ascertain if there was a rational doubt in the minds of the jury as to the guilt of the accused. When a case of homicide is brought to this court, on appeal, the grade of the offense must be determined by the evidence in the record. *Holland vs. the State*, 117.

11. The carrying arms on the person partially concealed is construed to be a violation of law prohibiting the carrying of arms secretly. The statute provides that arms shall be carried openly outside of all the clothes. *Sutton vs. the State*, 135.

12. Under the statute of this State regulating the subject at the time of this trial, there must have been fifteen grand jurors on the panel as originally drawn, 562.

13. After organization of the grand jury, in accordance with the terms of the statute, their proceedings are governed by common law rules, and the improper discharge of one member of the grand jury does not vitiate its proceedings if a sufficient number to find an indictment remain, 562.

14. Every indictment must be found by at least twelve, but it is not necessary that all above that number should be present consenting, 562.

15. The rules of law in granting continuances in civil and criminal cases are substantially the same, except so far as they are modified by the difference in proceeding. In criminal cases, however, the grounds for the motion should be scanned more closely than in civil cases, on account of superior temptation to delay, 562.

16. In a motion of this character much must be left to the tribunal before which the parties are. Circumstances occurring in its presence often

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indicate whether such motions are in good faith, and a writ of error will not be sustained on account of the refusal of the court to grant a continuance unless it is a plain and palpable instance of the arbitrary and oppressive exercise of the discretion necessarily vested by law, 562.

17. In applications for a continuance it must be shown by affidavit that the witness has been duly served with a subpoena, or a satisfactory reason assigned for the omission, and when it is not served, and the time at which the subpoena is issued is not disclosed, nor the residence of the witness stated, so that this court can determine the propriety of the order of the court below in these respects, this court will not interfere, 562.

18. General objection to questions addressed to witnesses, without stating the precise ground of objection, are vague and nugatory, and if entitled to weight anywhere without weight before an appellate court. If any grounds of objection were stated in the court below, the bill of exceptions should disclose them, and when they do not so appear this court will not pass upon them when urged here by way of argument or embodied in the assignment of errors, 562.

19. A past quarrel or encounter, if sufficient time for the cooling of passion has transpired, does not justify the killing of an unarmed man with a deadly weapon, 562.

20. The court, after charging as to the different grades of homicide and the requisite evidence to support them, is not bound on the motion of either party to repeat the same charge in substance, though varied in terms, 562.

21. An instruction to the effect that "if you believe from the evidence that the prisoner killed the deceased through fear or cowardice, or under the belief that great bodily harm is about to be done, although there was no danger to life or great bodily harm, it will be a justifiable killing, and you will acquit," is properly refused. Every person is presumed to be sane, and he should be held responsible for reasonable deductions. *The belief must be reasonable*; there must be reasonable ground for apprehending a design to take away life or do great bodily harm, and reasonable ground for believing the danger imminent that such design will be accomplished at the time of the killing, 562.

22. Before a person can avail himself of the defense that he used a deadly weapon in defense of his life, and be justified, he must satisfy the jury that the defense was necessary at the time; that he did all he could to avoid it, and that it was necessary to protect his own life or to protect himself from such great bodily harm as would give him a reasonable apprehension that his life was in immediate danger, 562.

23. What facts justify or excuse a homicide is a question of law. It is the province of the court to state what the rules of law are as to facts, and of the jury to determine whether such facts exist in the particular case, 562.

24. It is within the province of the court, after defining the different grades of homicide to restrict its charges to points of law arising upon

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the facts, being careful to give such instructions as cover all reasonable deductions, 562.

25. The prisoner, in a capital case, must be personally present during the whole of the trial, and at every step taken in the cause he has the right to discuss questions, both of law and of fact, and no step can be taken in his absence. *Gladden vs. The State*, 562.

(See Jury Practice, Constitutional Law, 6.)

DAMAGES—

1. Where the title is in the vendor of personal property, and upon a sale the vendee agrees to stand between the vendor and *all damages between him and the United States Government* which may thereafter occur, and at the time of the sale the authority of the United States is being actually exercised by the army of the United States, in military occupation of the district, the amount of the purchase money paid under a claim of right by the United States to an officer of the army of the United States by the vendor, after protest and imprisonment and notice to the vendee, held to be within the true meaning of the terms "all damages" under the peculiar circumstances of this case. *Johnson vs. Wright, Ex'r*, 478.

DECLARATION—

1. The rule of court which prescribes that unless the declaration be filed by the first day of the second term, the cause shall be dismissed, is not mandatory upon the court, but is only a right or privilege accorded to the defendant, to have the same dismissed upon motion, 138.

2. A waiver of praecipe and summons, and an acknowledgment of service, endorsed upon the declaration, is not to be so construed as to deprive the defendant of his right to make defense to the suit. *Ochus vs. Sheldon, Hoy's & Co.*, 138.

3. When there are good counts and bad counts in a declaration, and there is a plead to the good counts upon which issue is joined and the issue is undisposed of, yet if the plea is bad in substance, a judgment of the court below, which is warranted by the good counts, will not be reversed upon a writ of error. *Gregory vs. McNeely*, 579.

DECREE PRO CONFESSO—See Practice.

DEED—See Evidence, 1; Equity, 9, 10, 16, 17.

DEMURRER TO EVIDENCE—See Practice, 17.

DIVORCE—

1. Where, upon bill filed, a decree of divorce *a vinculo matrimonii*, and of reference to master to report as to allowance for alimony, is passed upon the consent and agreement of the parties, an appeal from the order confirming the report when made, and fixing the alimony, opens for consideration under the statute of this State the decree of divorce, and though the parties may not desire to disturb the decree of divorce, it will be reversed if improperly granted, 434.

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DIVORCE—(Continued.)

2. A decree of divorce from the bond of matrimony cannot be entered properly upon the mere consent or agreement of the parties of record. There must be a complaint of due form, for a cause authorized by law, *supported by due proof*. Underwood vs. Underwood, 434.

1. It being a requirement of the statutes of this State that "no divorce from the bond of matrimony shall be granted to any applicant, unless it shall appear that such applicant has resided in the State of Florida for the space of two years prior to the term of such application," this fact must be alleged in the bill, and be established by proof, 449.

2. Where the bill omits this material allegation, and in addition to this omission it fails to set up a sufficient ground of divorce, as well as the particular facts constituting the ground, no amount of testimony will justify the court in granting a decree of divorce *a vinculo matrimonii* upon it, 449.

3. Where, after an appearance, the matter of such bill is taken for confessed in default of an answer, and a final decree of divorce *a vinculo matrimonii* is passed upon testimony, an appeal from the final decree opens for the consideration of the court the matters charged in the bill, and if the averment necessary to give jurisdiction of the person is omitted, and if the matters charged in the bill are insufficient to sustain the decree, it will be reversed. Phelan vs. Phelan, 449.

(See Alimony, 1, 2, 3, 4, 5, 6.)

EMANCIPATION—

1. The proclamation of the President of the United States of January 1, 1863, known as the Emancipation Proclamation, was a military order founded upon a supposed military necessity, in a time of war, and became operative only when the Federal Government was enabled by the power of arms to enforce it. Slaback vs. Cushman, 472.

EMINENT DOMAIN—See Covenant, 1.

EQUITY—

1. Courts of equity will grant relief from judgments of courts of law in a variety of cases, as where the defense could not at the time or under the circumstances be made available at law, without laches of the party; and in cases of surprise where reasonable diligence could not avail and where the facts constituting the surprise are tantamount to a fraud, 185.

2. But where a party has a clear, adequate, and easy remedy at law of which he neglected to avail himself by reason of a misapprehension of well established rules of practice; or by reason of *anticipating* obstacles which might be met with in his progress, he stops short of pursuing his remedy, he is guilty of laches which estop him from pursuing his remedy in equity, 185.

3. As, where a party may have the benefit of a bill of exceptions, but neglects to avail himself of it, a court of equity will not step in to perform the legitimate office of such bill of exceptions. Dibble vs. Truluck, 185.

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EQUITY—(Continued.)

4. Where an action of ejectment has been tried in a State court, and a verdict and judgment rendered therein, and a writ of *certiorari* issued improvidently at the instance of the falling party out of the Circuit Court of the United States, in obedience to which the record has been certified by the State court into the United States court, and the State court to prevent a conflict suspends execution of the judgment, the party against whom the judgment was rendered being in possession, and in receipt of the rents of the premises in controversy, and being irresponsible, a State court of chancery may appoint a receiver to collect and hold the rents and profits of the premises until the final determination of the proceedings in the United States court, 301.

5. In such case a demurrer to a bill, (filed for the purpose of procuring the appointment of a receiver,) on the ground that the "subject matter of the controversy" is pending in the United States court, will not be sustained, 301.

6. This court will not set aside a decree for the purpose of enabling a party to answer who was duly served with process, and had ample opportunity to answer a bill, but neglected to do so before a decree *pro confesso* was entered, and made no attempt to file an answer before final decree. *Frisbee & Johnson vs. Timanus*, 301.

7. Where a party in a confidential relation to another, as by voluntarily undertaking to aid the other in obtaining possession of his property in the hands of others, takes advantage of this relation, and by deception or improper influences induces him to part with it without adequate consideration, a court of equity may lend its aid to obtain redress, whether the strict relation of principal and agent exists or not, 336.

8. Fraud in fact must be proved, and will not be presumed in the absence of facts tending to prove it, 336.

9. A party is not entitled to have his deed set aside and cancelled simply because he has not received the full consideration, 336.

10. A deed will not be set aside, and property thereby attempted to be conveyed restored to the grantor, on the ground that he has not executed his deed in conformity to law. *Harkness et ux. vs. Fraser et ux.*, 336.

11. An obstruction to navigation, which is a public nuisance, being the subject of a proceeding at the instance and in behalf of the State, by which it may be abated, and the person guilty of its erection punished, an individual cannot maintain an action, either at law or in equity, to have it abated or to prevent the creation of other like nuisances, unless he sustains damage beyond and in addition to that which falls alike upon the public, and he must seek relief in a court of law or equity, as the nature of his special injuries and the remedies for them should determine to be appropriate, 348.

12. Where the erection of a structure upon a public road or street, in a city is threatened, the structure being a public nuisance which works

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special damage to a neighboring proprietor in the enjoyment of his property in the vicinity, as well as to the value of it, a court of equity will grant an injunction to restrain its erection, but if the structure is some distance from the true line of the road or street, and does not interfere with the use to which the road is dedicated, it will not, on this ground, restrain its erection. *Alden et ux. vs. John Pinney*, 348.

13. Where A, claiming possession of real estate, institutes a possessory action at law against B, who is in possession under an agreement between them, which if set up in the action at law is a good defense, a court of equity will not enjoin the proceedings, but leave the party to make his defense at law, 393.

14. A court of equity will not entertain a bill where the plaintiff in possession seeks to enforce a merely legal title to land, without any supervening equity, 393.

15. Where there is no equity in the bill, or the case made shows a plain remedy at law, this court in an appeal of this character, should direct the bill to be dismissed, though these questions are not raised in the pleadings. *Freeman vs. Timanus*, 393.

16. The husband having executed a deed conveying the whole of his estate, the conveyance will not be set aside, upon a bill by the wife charging that the husband was of unsound mind, and incapacitated to contract at the date of its execution, 419.

17. Where such a bill is brought by the wife against the grantee of the husband, there being no equity in the bill, or *prima facie* case made against the defendant, an interlocutory order, directing such grantee to pay an allowance to the wife *pendente lite*, is improper. *Kilbee & Barnes vs. Myrick*, 419.

18. A judgment is a general lien upon real estate, and a court of law cannot control that general lien by directing execution of the judgment against specific portions of the property of the defendant in execution to the exclusion of other portions equally subject to the general lien, on account of equities claimed to exist in favor of a person not a party to the judgment or execution. *Clonts, Sheriff, vs. Ritch*, 633.

(See Injunction, Surety, Receiver, Practice, Master in Chancery, Nul-sance, Appeal.)

ERROR—

1. In the absence of a bill of exceptions showing the testimony given on the trial in the circuit court, this court will presume that there was adequate evidence before the jury to support the verdict, 537.

2. A judgment will not be reversed unless an error appears to have been committed by the court below, and the error must clearly appear in the record. *Frisbee & Johnson vs. Timanus*, 537.

3. In a motion for a continuance much must be left to the tribunal before which the parties are. Circumstances occurring in its presence often indicate whether such motions are in good faith, and a writ of error will not

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be sustained on account of the refusal of the court to grant a continuance unless it is a plain and palpable instance of arbitrary and oppressive exercise of the discretion necessarily vested by law, 562.

4. General objections to questions addressed to witnesses, without stating the precise ground of objection, are vague and nugatory, and if entitled to weight anywhere are without weight before an appellate court. If any grounds of objection were stated in the court below, the bill of exceptions should disclose them, and when they do not so appear this court will not pass upon them when urged here by way of argument or embodied in the assignment of errors. *Gladden vs. The State*, 562.

6. Where there are good counts and bad counts in a declaration, and there is a plea to the good counts upon which issue is joined, and the issue is undisposed of, yet if the plea is bad in substance, a judgment of the court below, which is warranted by the good counts, will not be reversed upon a writ of error. *Gregory vs. McNealy*, 578.

1. A writ of error is not commenced or brought and prosecuted with effect within the meaning of the statutes of this State until it is filed in the court which renders the judgment. The day on which it is issued is immaterial. *Crippen vs. Livingston*, 638.

EVIDENCE—

1. The entry, "this day came the parties by their attorneys," preceding a judgment *nil dicit*, which is followed by a direction to stay execution embodied in the judgment, accompanied with partial payments upon the execution, when issued, held to be evidence that the parties were present when the judgment was entered, and that a plea of the character mentioned was abandoned. *Gregory vs. McNealy*, 578.

2. The plat of a town referred to in a deed as containing a description of the boundaries of a lot fixes these boundaries as satisfactorily as natural objects, and if in a deed referring to a plat as containing the general conformation of the lot granted, its locality is given by well-defined lines, and the width of the lot is given by measurement, one of the calls is in such language as it may indicate either aspect or a natural boundary, this doubtful call must be given that signification which is most consistent with the evidence in the case. *Alden and wife vs. John Pinney*, 348.

EXCEPTIONS—See Bill of Exceptions.

EXECUTION—See Equity, 18, and Process.

FRAUD—

1. Where a party in a confidential relation to another, as by voluntarily undertaking to aid the other in obtaining possession of his property in the hands of others, takes advantage of this relation, and by deception or improper influences induces him to part with it without adequate consideration, a court of equity may lend its aid to obtain redress, whether the strict relation of principal and agent exists or not, 336.

2. Fraud in fact must be proved, and will not be presumed in the absence of facts tending to prove it. *Harkness and wife vs. Fraser and wife*, 336.

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GRAND JURY—See Jury, 16, 17, 18.

HABEAS CORPUS—

Ex Parte Wm. Nightingale, 272.

HUSBAND AND WIFE—See Equity, 16, 17.

IMPEACHMENT—

To constitute an impeachment so as to be effective under the Constitution to suspend the officer, the articles of impeachment must be presented to the Senate, and a constitutional quorum of the Senate must receive them. Executive Communication, 653.

INDEMNITY—

1. Where the title is in the vendor of personal property, and upon a sale the vendee agrees to stand between the vendor and *all damages between* him and the United States Government which may thereafter occur, and at the time of the sale the authority of the United States is being actually exercised by the army of the United States, in military occupation of the district, the amount of the purchase money paid under a claim of right by the United States to an officer of the army of the United States by the vendor, after protest and imprisonment and notice to the vendee, held to be within the true meaning of the terms "*all damages*" under the peculiar circumstances of this case. *Johnson vs. Wright, Ex'r.*, 478.

INFORMATION IN THE NATURE OF A QUO WARRANTO—

2. A grant of power to issue a writ of *quo warranto* embraces and includes the proceeding by information in the nature of a *quo warranto*, this proceeding being civil in its essential incidents, and having in view the same object, 190.

3. A constitutional grant of power to issue a writ of *quo warranto*, can be exercised by this court without legislative action prescribing the mode and manner of its exercise, and the court will discharge its duty by a course conformable to the principles of the common law, in the absence of legislation upon the subject, 190.

4. A plea to an information, in the nature of a *quo warranto*, should set out the defendant's title at length; it should be responsive to the information. The defendant must justify or disclaim, and not guilty, or *non usurparit*, are not good pleas. All the facts necessary to constitute a good title must be set up. In default of such a plea judgment by default goes for the State, 190.

5. The Attorney-General is the proper officer to file an information, in the nature of a *quo warranto*, against a person holding a public office, to inquire into his title to the same. It is a power incident to his office. Upon the filing of the information the writ issues upon his demand, as in ordinary actions of debt by the State against its debtors, and in a case of this character the court cannot inquire into his motives, or the motives of a third person alleged to influence his action, 190.

6. The proceeding by information, in the nature of a *quo warranto*, is

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essentially a civil proceeding, and the pleadings in it are as much subject to amendment as they are in ordinary civil actions. It is criminal only in form. *State vs. Gleason*, 190.

INJUNCTION—

1. The object and purpose of an injunction is to preserve and keep things in the same state or condition, and to restrain an act which, if done, would be contrary to equity and good conscience, and is the appropriate relief when the remedy at law is subsequent to the injury, and the effect cannot be adequately compensated, 26.

2. To support a motion for an injunction, the bill should set forth a case of probable right, and a probable danger that the right will be defeated without the interposition of the court. It interposes between the complainant and the injury he fears or seeks to avoid. If the injury be already done, the writ of injunction can have no application, for it cannot be applied correctly so as to remove it.

3. The insolvency of the debtor is never a sufficient reason of itself for the exercise of the extraordinary power of the court by way of injunction. There must be some other equitable ground combined with insolvency, 26.

4. To authorize the interposition of the court to stay waste it must appear to the satisfaction of the court that, unless its aid is given, irreparable injury will be done to the complainant or his property, 26.

5. The existence of a "lien" on behalf of the complainant, will not entitle him to an injunction to restrain the defendant in the free use and enjoyment of his property, 26.

6. In cases of lien, to entitle a complainant to the aid of an injunction, he must show that the free enjoyment of the property by defendant will, in all probability, tend to its injury or destruction to an extent that will impair its value as a security for his demand, and peril its ultimate payment. *P. & G. & At. & Gulf R. R. Co. vs. Spratt & Callahan*, 26.

JUDGMENT—

1. A judgment authorized by a statute which creates the debt upon which it is based, and which is entered in favor of a person whose suit or demand the defendant has not been summoned to answer, is void. *Ex Parte Wm. Nightingale*, 272.

2. A judgment is a general lien upon real estate, and a court of law cannot control that general lien by directing execution of the judgment against specific portions of the property of the defendant in execution to the exclusion of other portions equally subject to the general lien, on account of equities claimed to exist in favor of a person not a party to the judgment or execution. *Clonts, Sheriff, vs. Ritch*, 633.

3. Courts of equity will grant relief from judgments of courts of law in a variety of cases, as where the defense could not at the time or under the circumstances be made available at law, without laches of the party; and in case of surprise where reasonable diligence could not avail, and where the facts constituting the surprise are tantamount to a fraud, 185.

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JUDGMENT—(Continued.)

4. But where a party has a clear, adequate, and easy remedy at law of which he neglected to avail himself by reason of a misapprehension of well-established rules of practice: or, by reason of *anticipating* obstacles which might be met with in his progress, he stops short of pursuing his remedy, he is guilty of laches which estop him from pursuing his remedy in equity, 185.

5. As, where a party may have the benefit of a bill of exceptions, but neglects to avail himself of it, a court of equity will not step in to perform the legitimate office of such bill of exceptions. *Dibble vs. Truluck*, 185.

JURISDICTION—

It being a requirement of the statutes of this State that "no divorce from the bond of matrimony shall be granted to any applicant, unless it shall appear that such applicant has resided in the State of Florida for the space of two years prior to the term of such application," this fact must be alleged in the bill, and established by proof. *Phelan vs. Phelan*, 449.

(See Constitutional Law; Equity, 4, 14, 15, 18; Courts, 2, 3, 4, 9.)

JURY—

1. After a juror has been regularly sworn and empanelled, the fact that he was a juror previously in the same cause when there was a mistrial, because the jury could not agree, does not authorize or require his being set aside in the second trial, when it does not appear that the juror is prejudiced, partial or biased in regard to the matters or questions submitted to the jury, and this in the judgment and discretion of the court, 18.

2. Judges are not authorized or required to give charges or instructions to juries on abstract questions of law not pertinent to the case before the court, and having no relation thereto, 18.

3. Where a sealed verdict (by consent) has been rendered by a jury, neither party has the right to demand that the jury be polled. This may be done, however, at the discretion of the judge, whose duty it is to see that no wrong or injustice is done to parties, and whose discretion in such cases is not matter for review by this court. *Whitner vs. Hamlin*, 18.

4. The separation of a juror from his fellows, after the jury have been sworn, and before they have rendered a verdict without the consent of the judge, will not "*per se*" avoid the verdict. It will amount to a contempt of court on the part of the juror, for which he may be punished by fine or imprisonment, or both, 152.

5. When a juror separates from his fellows after he has been sworn and before verdict, without the consent of the court, and it can be shown that during the separation there is a reasonable cause to apprehend that some improper practice had taken place, or some undue influence exerted over the juror, it will be the duty of the court, in the exercise of a sound discretion, to set aside the verdict and award a "*venire de novo*," 15

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JURY—(Continued.)

6. A verdict should never be set aside for a juror's misbehavior towards the court, unless it is prejudicial to one or other of the parties, 152.

7. In trials for offences punished capitally, the conduct of a juror who separates from his fellows should be subjected to the most rigid scrutiny in order to ascertain if it was blameless while separated from his fellows, and the verdict should not only be allowed to stand when the prosecution can show that there was no opportunity to tamper with the juror, or to influence him in finding his verdict. In all cases other than capital felonies, the verdict should stand, unless the party against whom it is given can show improper influences were used to produce it, 152.

8. When a person is called as a juror, he may be examined in "*voir dire*," and asked whether he is twenty-one years of age? Whether he has the requisite property qualifications? Whether he is interested in the result of the suit, or is of kin to either of the parties? And whether he is a citizen? and indeed, all questions that are pertinent the answer to which will not tend to degrade the juror, or to his dishonor or discredit. In prosecutions for felony, he may be further interrogated as to whether he has made up and expressed an opinion as to the guilt or innocence of the accused, 152.

9. If parties in civil suits, or the accused in criminal prosecutions, omit to inquire into the qualifications of a juror when he is called to the box to be sworn, and to make objection to him before he is sworn, it will be too late to raise the objection after he has been sworn, 152.

10. When a party has the right to object to a juror in civil suits, or to challenge him in criminal prosecutions, and neglects or omits to do so before the juror is sworn, it would require a strong case of hardship to induce the court to interfere to set aside a verdict and award a "*venire de novo*," 152.

11. An appellate court will relieve a party by setting aside the verdict and awarding a "*venire de novo*" where one of the jurors who served on the trial had been convicted of an infamous crime, which fact was unknown to the party at the time of the trial, and about which he would not be allowed to inquire on "*voir dire*." Jurors must be "*probi et legales homines*," 152.

12. A large discretion is vested in the judge who tries the cause in the court below; and if from any cause the mind of a juror is not in a proper and fit state to render an impartial verdict the judge who presides at the trial, in the exercise of a sound legal discretion, should award a "*venire de novo*," in order that the ends of justice may be attained, 152.

13. The incompetency that will authorize the court to interfere after a juror has been sworn, must be of such a character as would defeat a fair and impartial trial, if the juror is permitted to serve or the verdict is allowed to stand, 152.

14. A fixed domicile of the juror in the county in which the court is held,

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without regard to length of time of such domicile, if sufficient to constitute the party a juror, and neither the want of length of residence or qualification as a householder, is such an objection to a juror as will justify the setting aside a verdict. *State vs. Madoll*, 152.

15. Relationship, by affinity to one of the parties within the ninth degree, is, by common law, a ground of challenge of a juror. But where a juror is called who is "first cousin to plaintiff's wife's mother," and the defendant being present makes no objection, and does not afterwards show that he was unaware of the relationship, (though his counsel does make an affidavit to that fact,) and it does not appear that the persons through whom such relationship existed are still living, such cause is not sufficient to set aside a verdict, especially when there is no evidence that the juror is in fact influenced from that cause. *Morrison vs. McKinnon*, 562.

16. Under the statutes of this State regulating the subject at the time of this trial, there must have been fifteen grand jurors on the panel as originally drawn, 562.

17. After organization of the grand jury, in accordance with the terms of the statute, their proceedings are governed by common law rules, and the improper discharge of one member of the grand jury does not vitiate its proceedings if a sufficient number to find an indictment remain, 562.

18. Every indictment must be found by at least twelve, but it is not necessary that all above that number should be present consenting, 562.

What facts justify or excuse a homicide is a question of law. It is the province of the court to state what the rules of law are as to facts, and of the jury to determine whether such facts exist in the particular case. *Gladden vs. The State*, 562.

LANDLORD AND TENANT—

1. An agreement in writing properly executed, and stipulating that the amount due for rent of land should be paid before the crops are removed, held to be a "security for the payment of money," and under the provisions of the statute to operate as a mortgage, 166.

2. But being a mortgage on personal property, no lien is thereby created, unless it be duly recorded in compliance with the requisition of the statute, 166.

3. The act of 1865-6, entitled "An Act for the relief of Landlords," was designed only to enlarge and extend the "remedy" for the collection of rent, and does not interfere with any pre-existing "rights" of the parties. *Ward vs. Standley*, 166.

LEGISLATURE—

1. The Legislature of this State has no authority to hear and determine a case involving the right and title to the office of Lieutenant-Governor of this State. This is a power distinct from the right of the Senate to try an officer for crime upon articles of impeachment preferred by the Assembly. It is judicial in its character, and a matter solely within judicial cogni-

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zance. Nor is it a political question beyond the power of the courts to determine. *State vs. Gleason*, 190.

2. Sec. 8, Art. IV., of the Constitution provides that a "majority of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and may compel the presence of absent members, in such manner and under such penalties as each House may prescribe."

The term "House" in this clause of the Constitution, when used in reference to the matter of quorum, means the entire number of which the Assembly or Senate *may be composed*. A quorum for the purposes of general legislation is not less than a majority of the whole number of which the "House" *may be composed*. Vacancies from death, resignation, or failure to elect, cannot be deducted in ascertaining a quorum. Executive Communication, 653.

3. The Senate of the United States is the exclusive judge of the election, return and qualification of its own members. Whether an election of a Senator by a State Legislature is in conformity with such regulations as are prescribed by Congress, or whether, for want of strict conformity therewith, it is illegal and void, are questions which this court has no jurisdiction to decide. Executive Communication, 686.

4. The provision of the Constitution, that the salaries of officers shall be payable quarterly, does not refer to the "pay" of members of the Legislature; their "pay" may be drawn at such times as the Legislature may, by law, determine. Executive Communication, 689.

(See Impeachment, 1.)

LIEN—

1. The existence of a "lien" on behalf of the complainant, will not entitle him to an injunction to restrain the defendant in the free use and enjoyment of his property, 26.

2. In cases of lien, to entitle a complainant to the aid of an injunction, he must show that the free enjoyment of the property by defendant will, in all probability, tend to its injury or destruction to an extent that will impair its value as a security for his demand, and peril its ultimate payment. *P. & G. R. R. vs. Spratt & Callahan*, 26.

(See Landlord and Tenant, 1, 2, 3.)

LIMITATIONS—

1. A writ of error is not commenced or brought and prosecuted with effect within the meaning of the statutes of this State until it is filed in the court which rendered the judgment. The day on which it is issued or bears test is immaterial. *Crippen vs. Livingston*, 638.

LUNATIC—See Equity, 16, 17.

MALICE—See Criminal Law.

MANDAMUS—

1. Where in a proceeding to disbar an attorney, an inferior court has

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decided erroneously on the testimony, and a plain case of wrong and injustice is presented, the appropriate remedy for restoration is by mandamus rather than writ of error. *The State of Florida vs. Wm. Kirke*, 278.

MASTER'S REPORT—

1. When a bill is filed, and a cause is at issue, and the nature of the case requires a statement of account by a master, and the master in his report simply recapitulates immaterial portions of the testimony, without stating an account, no decree can be based upon such report, 310.

2. Where the appellate court cannot determine from the report of a master or from evidence in the case the basis upon which the decree was made, the decree will be reversed. *June vs. Myers*, 310.

(See Practice.)

MORTGAGE—See Landlord and Tenant, 1, 2, 3.

NEW TRIAL—

1. Where two juries have concurred in finding a verdict, it ought not to be set aside as against the weight of evidence; otherwise, when it is clearly against evidence, 497.

2. Where the evidence is contradictory, making it the duty of the jury to decide upon the credibility of the witnesses, the court will not set aside a verdict as against the weight of evidence, 497.

3. Where a jury on a second trial find a verdict against the decision of the court on a former motion for a new trial upon a point of law, the court will grant a new trial, 497.

4. If a verdict be found upon testimony which did not tend to prove a material fact necessary to entitle a party to recover, or upon a misapplication of the facts to the charge of the court, a new trial will be ordered, though the same verdict may have been found by two juries upon the same state of facts. *P. & G. R. R. vs. Nash*, 497.

5. Where there is testimony tending to prove the concurrent understanding and intention of the parties as to the particular terms of a parol agreement, and the jury have passed upon it, the verdict will not be disturbed; particularly where the charge of the court was proper. *Morrison vs. McKinnon*, 552.

6. Where the pleadings are regular, and the defendant's attention on crossing plaintiff's interrogatories for the examination of witnesses is called to the character of a draft upon the defendant, which draft is a proper cause of action in the case under an agreement of the parties, "not being advised of the particular character of the draft," under such circumstances, is no such matter of surprise as to authorize a new trial, 640.

7. If from a general review of the case there was evidence to justify the verdict, and it does not clearly appear that there have been errors in law or fact which necessarily operated to the prejudice of the defendant, a new trial will not be granted for surprise. *Orthing vs. Gundersheimer*, 640.

1. Where a verdict is clearly against evidence, or clearly in disregard of

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preponderating evidence, it will be set aside and a new trial granted. *Branch & Clark vs. Wilson*, 543.

(See Jury, 5, 6, 7, 10, 11, 12, 13, 14.)

NOTE—See Promissory Note.

NUISANCE—

2. All obstructions to the navigation of a bay or harbor, not authorized by the Legislature, are public nuisances, but all structures built upon submerged soil between the line of high tides of a navigable bay and its channel are not *ipso facto* nuisances; whether they are nuisance is a question of fact to be determined in each case, 348.

3. An obstruction to navigation which is a public nuisance, being the subject of a proceeding at the instance and in behalf of the State, by which it may be abated, and the person guilty of its erection punished, an individual cannot maintain an action, either at law or in equity to have it abated or to prevent the creation of other like nuisances, unless he sustains damage beyond and in addition to that which falls alike upon the public, and he must seek relief in a court of law or equity, as the nature of his special injuries and the remedies for them should determine to be appropriate, 348.

4. Where the erection of a structure upon a public road or street, in a city is threatened, the structure being a public nuisance which works special damage to a neighboring proprietor in the enjoyment of his property in the vicinity, as well as to the value of it, a court of equity will grant an injunction to restrain its erection, but if the structure is some distance from the true line of the road or street, and does not interfere with the use to which the road is dedicated, it will not, on this ground, restrain its erection. *Alden and wife vs. Pinney*, 348.

OFFICE AND OFFICER—

1. The Attorney-General is the proper officer to file an information, in the nature of a *quo warranto*, against a person holding a public office to inquire into his title to the same. It is a power incident to his office. Upon the filing of the information the writ issues upon his demand, as in ordering actions of debt by the State against its debtors, and in a case of this character, the Court cannot inquire into his motives or the motives of a third person alleged to influence his action, 191.

2. The Legislature has no authority to hear and determine a case involving the right and title to the office of Lieutenant-Governor. This is a power distinct from the power of the Senate to try impeachments, and a matter solely within judicial cognizance. It is not a political question beyond the power of the courts to determine, 191.

3. The right to an office will not be inquired into collaterally; the only method known to the law of trying the legal title to an office is by a direct proceeding for that purpose, 192.

4. An officer *de facto* is one exercising the duties of an office under color

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of election or appointment, and his acts are as valid and binding upon the public, or upon third persons, as those of an officer *de jure*, 192.

5. The terms "registered voter," in section 22, article XVI., of the Constitution of this State refer to the registration authorized by the 6th section article XIV., of the Constitution. It did not become operative as a requirement for eligibility to office before the Legislature had passed a registration law and the constitutional requirement could be complied with, 192.

6. The office of Lieutenant-Governor of this State being an office created by the Convention which framed the Constitution of the State, it is not controlled in such manner by the legislation of Congress authorizing the holding of such Convention as makes the constitutional requisites for eligibility inoperative. Officers elected at the first election to fill the offices provided by the Constitution must be eligible according to its requirements. *State vs. Gleason*, 191.

7. Members of what is known as the "Secession Convention" were neither executive nor judicial officers of this State. Within the meaning of these terms as used in Section 1, Article XVI., of the Constitution of this State. A person who was a member of such Convention, and signed the ordinance of secession, and who afterwards gave aid and comfort to the enemies of the United States, is not prohibited from holding any office executive, legislative, or judicial, in this State. Executive Communication, 651.

8. To constitute an impeachment so as to be effective under the Constitution to suspend the officer, the articles of impeachment must be presented to the Senate, and a constitutional quorum of the Senate must receive them. Executive Communication, 653.

PARTNERSHIP—

A, B, and C, being partners, agree upon a dissolution; B and C assign and transfer all their interest in the joint property to A, who assumes the payment of the joint debts, and covenants to save B and C harmless.

Held:

1. That the property ceases by such agreement to be joint property, and that the lien or equity of the retiring partners to have a sale of the property, and an application to the joint debts, is destroyed, 315.

2. That as between C and A a relation analagous to that of principal and surety exists by virtue of A's assumption of the debts and his covenant, and that, saving the rights of the joint creditors, C has the standing of a surety in a court of equity, 315.

3. When the liability of a surety has attached in consequence of the default of the principal, the surety who has been sued by the creditor may apply to a court of equity and compel the principal to relieve him from his liability, 315.

4. Where the Chancellor has, upon a bill filed by the surety in such a case, appointed a receiver to take charge of the old stock and such prop-

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erty as has been purchased by the proceeds of sales of what was once joint property, this court will not direct such order to be vacated unconditionally in a case where the principal debtor has transferred a portion of his money to another State, and is doing such acts as indicate an intention to disregard his covenant, and which if not checked will result in loss to the surety. Such an order should be vacated only on such terms as would secure the application of such property to the payment of the joint debts to the relief of the surety. *West & West vs. Chasten*, 315.

PAYMENT—See Appropriation of Payments.

PLEADING—

1. A plea to an information in the nature of a *quo warranto*, should set out the defendant's title at length; it should be responsive to the information. The defendant must justify or disclaim, and not guilty, or *non usurpavit*, are not good pleas. All the facts necessary to constitute a good title must be set up. In default of such a plea judgment by default goes for the State, 190.

2. A prosecution instituted in the name and in behalf of the people of the State of Florida, is a subsequent compliance with the constitutional requirement in section 2, Article VI., viz.: "The style of all process shall be 'The State of Florida,' and all prosecutions shall be conducted in the name and by the authority of the same." It is sufficient, if it appear from the record that it is conducted by the authority of the State of Florida as distinct from the authority of any other power, 190.

3. The proceeding by information, in the nature of a *quo warranto*, is essentially a civil proceeding, and the pleadings in it are as much subject to amendment as they are in ordinary civil actions. It is criminal only in form. *State vs. Gleason*, 190.

PRACTICE—EQUITY—

1. Under the prayer for "general relief," such relief may be afforded to the complainants as is *consistent* with the case made in the bill, provided the relief granted does not conflict with that specifically prayed, 26.

2. A court will not suffer a defendant to be taken by surprise, and permit a plaintiff to neglect and pass over the special prayer he has made for relief, and take another decree, even though it be according to the case made by his bill, 26.

3. The plaintiff cannot desert specific relief prayed, and under the general prayer ask special relief of another description. Under the general prayer the plaintiff shall have such other relief as is *consistent* with the case made and the special prayer, and no more, 26.

4. The exception to this general rule is, when there is an *obstruction* to the court's granting the particular relief prayed. In such cases the plaintiff may take a different decree under the general prayer. *P. & G. and A. & G. R. Co.'s vs. Spratt & Callahan*, 26.

5. This court will not set aside a decree for the purpose of enabling a

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party to answer who was duly served with process, and had ample opportunity to answer a bill, but neglected to do so before a decree *pro confesso* was entered, and made no attempt to file an answer before final decree, 301

6. The appointment of a receiver is a matter resting in the sound discretion of a Court of Equity, and a receiver is treated as the representative or agent of the court, and subject to its orders. He is appointed to secure the benefits of such persons as shall be entitled, and the proceeding does not affect the rights of parties on the subject matter. *Frisbee & Johnson vs. Timanus*, 301.

7. When a bill is filed, and a cause is at issue, and the nature of the case requires a statement of account by a master, and the master in his report simply recapitulates immaterial portions of the testimony, without stating an account, no decree can be based upon such report, 310.

8. Where the appellate court cannot determine from the report of a master or from the evidence in the case the basis upon which the decree was made, the decree will be reversed. *June vs. Myers*, 310.

9. Where a bill is taken *pro confesso*, and a final decree is passed under the statute, an appeal lies to this court under the practice in this State and in all cases such an appeal opens for the consideration of this court the record prior to the default, 393.

10. Where there is no equity in the bill, or the case made shows a plain remedy at law, this court, in an appeal of this character, should direct the bill to be dismissed, though these questions are not raised in the pleadings. *Freeman vs. Timanus*, 393.

11. Under the statutes regulating appeals in chancery from final or interlocutory decrees, a bond is not necessary to perfect an appeal. The only result attending a failure to give bond under the statutes is, that the appeal does not operate as a supersedeas, 416.

12. Where an appeal is prosecuted from an interlocutory order or decree in chancery, under the act of 1853, if the bond is in a sufficient amount and so conditioned as to secure the appellee fully in his rights, as well as for all damages in the event the decree of the court below is affirmed, either in whole or in part, it is a sufficient bond. *Kilbee and Barnes vs. Myrick*, 416.

13. Deficiencies in the record cannot be taken advantage of by motion to dismiss the appeal. If the appellee desires to remedy the deficiency, he must suggest the diminution and move for a *certiorari* under the rules, 432.

14. What is good cause for an omission to file a copy of the record on the first day of the term of this court in accordance with the statute, is matter to be addressed to the discretion of the court. In this case, held that the State of the country at and preceding the first term of this court was sufficient cause to excuse a failure to file the record on the first day of that term. *Underwood vs. Underwood*, 432.

15. It being a requirement of the statutes of this State that "no divorce from the bond of matrimony shall be granted to any applicant, unless it

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shall appear that such applicant has resided in the State of Florida for the space of two years prior to the term of such application," this fact must be alleged in the bill, and established by proof. *Phelan vs. Phelan*, 449 (See Appeal, Injunction, Divorce, Receiver, Alimony.)

PRACTICE—LAW—

1. After a juror has been regularly sworn and empanelled, the fact that he was a juror previously in the same cause when there was a mistrial, because the jury could not agree, does not authorize or require his being set aside in the second trial, when it does not appear that the juror is prejudiced, partial or biased in regard to the matters or questions submitted to the jury, and this is in the judgment and discretion of the court, 18.

2. Judges are not authorized or required to give charges or instructions to juries on abstract questions of law not pertinent to the case before the court, and having no relation thereto, 18.

3. Where a sealed verdict (by consent) has been rendered by a jury, neither party has the right to demand that the jury be polled. This may be done, however, at the discretion of the judge, whose duty it is to see that no wrong or injustice is done to parties, and whose discretion in such cases is not matter for review by this court. *Whitner vs. Hamlin*, 18.

4. The rule of court which prescribes that unless the declaration be filed by the first day of the second term, the cause shall be dismissed, is not mandatory upon the court, but is only a right or privilege accorded to the defendant, to have the same dismissed upon motion.

5. A waiver of praecipe and summons and an acknowledgment or service, endorsed upon the declaration, is not to be so construed as to deprive the defendant of his right to make defense to the suit.

6. Both by the rule of the common law and by the statute of Florida, a judge is precluded from sitting on the trial of any cause in which he may have a pecuniary interest. Whether under the second section of the act of 1862, the defendant may waive the objection. Query? *Ochus vs. Hoyt*, 138.

7. The notice required in attachment suits is to enable defendant to appear and plead to the merits of the cause, and not to appear and contest the validity of the writ, and the only limitation to the time of notice is, that no judgment can be rendered before satisfactory proof of such notice, 144.

8. To obtain the writ of attachment it is only necessary to file the proper affidavit and bond with the clerk—a praecipe is not required by law. The time of filing the affidavit for attachment is made by statute, for all legal purposes, the date of the commencement of the suit, 144.

9. The rule of this court, adopted in 1854, was not intended to regulate the practice in the circuit courts. It is directed to the clerks in making up a record to be used in this court, to copy the papers in the order in which they were originally filed. *Simpson & Co., vs. Knight et al*, 144.

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PRACTICE—LAW—(Continued.)

10. A prosecution for crime must be conducted in the name and by the authority of the State of Florida. *Ex Parte Wm. Nightingale*, 272. *State vs. Gleason*, 190.

11. Where it is intended to apply to the court to have an attorney disbarred, the proper course of proceeding is to present the charge to the court, and it will direct a rule to show cause why the name of the attorney should not be stricken from the roll, if a case proper for the action of the court is presented; this rule is awarded, served and returned, and the court hears and determines the matter according to law, 278.

12. A regular complaint against an attorney ought not to be received and acted on unless made on oath, and the charge made should be specific and particular, so that the officer may be aware of the precise nature of the accusation he is to meet. *State vs. Wm. Kirke*, 278.

13. It is the imperative duty of the court to dismiss an appeal upon an application based on the production of the certificate of the clerk of the circuit court that an appeal has been obtained and a bond given, the copy of the proceedings in the court below not being filed, unless the party in default shows some good cause for not having complied with the statute, 493.

14. What is "good cause" for an omission to file a copy of the record of proceedings with the clerk of the Supreme Court, after taking an appeal, is matter to be addressed to the sound discretion and judgment of the court, 493.

15. Neglect to file the proceedings of the circuit court because the appellant or his counsel had reason to believe that no cause would be heard at the commencement of the term, is not "good cause" for the omission, the law requiring the appellant to file the papers with the clerk of the Supreme Court on the first day of the term. *Rains vs. Thomas*, 493.

16. Though a court make an incorrect ruling as to the admissibility of testimony, if it be afterwards corrected, and such testimony admitted in time to give the party all the benefit of the facts sought to be proved, such erroneous ruling will not be ground for granting a new trial, 552.

17. It is discretionary with a court whether to compel a party to join in demurrer to evidence, 552.

18. Where there is testimony tending to prove the concurrent understanding and intention of the parties as to the particular terms of a parol agreement and the jury have passed upon it, the verdict will not be disturbed, particularly where the charge of the court was proper. *Morrison vs. McKinnon*, 552.

(See titles Appeal, Error, Jury, Attorney-General, Mandamus, Information in the nature of a Quo Warranto, Criminal Law, Charge of Court, Bill of Exceptions, Continuance, New Trial.)

PRESIDENT OF THE UNITED STATES—See Emancipation.

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PROCESS—

1. A paper purporting to be a writ of *certiorari*, without the seat of the court from which it purports to be issued, and without being tested according to law, is a nullity. *Frisbee & Johnson vs. Timanus*, 537.

(See Courts, 9.)

PROMISSORY NOTE—

1. In an action by the bearer of a promissory note against the maker, a plea setting up "that the plaintiff at the time of the commencement of the suit did not possess and was not seized in his own right of the legal title to the promissory note, the same not having been assigned or transferred to him by the original payee thereof, or by any other person having the legal thereto," is not a good plea.

2. Possession by plaintiff *in his own right* at the commencement of a suit upon a note payable to bearer is not essential to a recovery. Possession by an agent or trustee is sufficient to maintain an action at law in his own name as bearer, and proof of agency only results in permitting the defendant to avail himself of any defense against the principal which he may have.

3. A plea of this kind is not available unless it sets up that plaintiff is possessed *mala fide*, or by casualty without consideration.

4. Plea of an assignment of such a note to plaintiff by a party not having the legal title would not defeat the action. It should go further, and set up that it was not acquired *bona fide* and for a valuable consideration without notice. *Gregory vs. McNealy*, 578.

QUORUM—See Legislature, 2.

QUO WARRANTO—See Information.

RECEIVER—

1. Where an action of ejectment has been tried in a State court, and a verdict and judgment rendered therein, and a writ of *certiorari* issued improvidently at the instance of the failing party out of the Circuit Court of the United States, in obedience to which the record has been certified by the State court into the United States court, and the State court, to prevent a conflict, suspends execution of the judgment the party against whom the judgment was rendered being in possession, and in receipt of the rents of the premises in controversy, and being irresponsible, a State court of chancery may appoint a receiver to collect and hold the rents and profits of the premises until the final determination of the proceedings in the United States court, 301.

2. The appointment of a receiver is a matter resting in the sound discretion of a court of equity, and a receiver is treated as the representative or agent of the court, and subject to its orders. He is appointed to secure the benefits of such persons as shall be entitled, and the proceeding does not affect the rights of parties on the subject matter. *Frisbee & Johnson vs. Timanus*, 301.

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RECEIVER—(Continued.)

A, B, and C being partners, agree upon a dissolution; B and C assign and transfer all their interest in the joint property to A, who assumes the payment of the joint debts, and covenants to save B and C harmless.
Held:

2. That the property ceases by such agreement to be joint property, and that the lien or equity of the retiring partners to have a sale of the property, and an application to the joint debts, is destroyed, 315.

3. That as between C and A a relation analagous to that of principal and surety exists by virtue of A's assumption of the debts and his covenant, and that, saving the rights of the joint creditors, C has the standing of a surety in a court of equity, 315.

4. When the liability of a surety has attached in consequence of the default of the principal, the surety who has been sued on by the creditor may apply to a court of equity and compel the principal to relieve him from his liability, 315.

5. Where the Chancellor has, upon a bill filed by the surety in such a case, appointed a receiver to take charge of the old stock and such property as has been purchased by the proceeds of sales of what was once joint property, this court will not direct such order to be vacated unconditionally in a case where the principal debtor has transferred a portion of his money to another State, and is doing such acts as indicate an intention to disregard his covenant, and which if not checked will result in loss to the surety. Such an order should be vacated only on such terms as would secure the application of such property to the payment of the joint debts to the relief of the surety. *West & West vs. Chasten*, 315.

RECOUPMENT OF DAMAGES—

2. Where upon a sale of property, a note being given for the price, and a bill of sale given in terms conveying the present title to the property, yet if there be a subsequent independent agreement to deliver the property sold at a future time, and the seller refuses or fails to deliver the property the defendant may avail himself of these circumstances to defeat a recovery, upon suit brought by the payee upon the note. *Branch & Clark vs. Wilson*, 543.

SALARIES—See Legislature, Constitutional Law.

SLAVES—

1. The warranty contained in a bill of sale given for a negro that he was to be a slave for life, is not broken by the subsequent act of government which abolished in the Southern States the institution of negro slavery. *Walker vs. Gatlin*, 1.

2. The proclamation of the President of the United States of January 1, 1863, known as the Emancipation Proclamation, was a military order founded upon a supposed military necessity, in a time of war and became operative only when the Federal Government was enabled by the power of arms to enforce it. *Slaback vs. Cushman*, 472.

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STATUTES CONSTRUED OR REFERRED TO—

1. Chap. 75, Laws of Fla., Sec. 3, An Act amendatory of the Criminal laws now in force in this State, approved Jan. 6, 1847. 135.
2. Chap. 1327, secs. 1 & 2, An Act in relation to the qualification of judges, approved Dec. 4, 1862, 138.
3. Sec. 1, Par. 4, Thomp. Dig., 368, Attachment, 146.
4. Sec. 3, Par. 1, Thomp. Dig. 369, Attachment, 146.
5. Attachment statutes construed, 589, to 618, 628 to 632.
6. Sec. 1, Par. 1, Thomp. Dig. 325, commencement of action, 146.
7. Sec. 1, Par. 1, Thomp. Dig., 376. Mortgage of Personal Property, 166.
8. Sec. 4, Par. 2, Thomp. Dig., 183. Mortgage of Personal Property, 166.
9. Chap. 1498, An Act for the relief of Landlords. Rent and Lien, 166.
10. Chap. 2, Sec. 2. An Act to organize the office of Attorney-General of the State of Florida. 225.
11. An act to protect all persons in the United States in their civil rights and furnish the means of their vindication, 242-6.
12. An Act relating to Habeas Corpus and regulating judicial proceedings in certain cases, approved March 3, 1863, 242.
13. An Act to amend An Act relating to Habeas Corpus, approved March 5, 1863. 242-6.
14. An Act regulating Judicial proceedings in certain cases, approved May 11, 1866. 242-6.
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16. Sec. 25, Act of Congress relating to writs of error, approved Sept. 24, 1789. 268-9.
17. Sec. 1, Par. 1 & 2, Thomp. Dig., 322, 323. Admission of Attorneys, 280.
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19. Chap. 521, An Act in addition to and amendatory of the several acts concerning writs of error and appeals to the Supreme Court, approved Jan. 7, 1853. 295, 403, 417.
20. Sec. 2, Pars. 1 to 10. Thomp. Dig., 464. Master in Chancery, 313.
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22. Par. 9, Thomp. Dig., 458. Insisting upon special matter in answer in Chancery instead of stating it by former plea or demurrer, 378.
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25. Sec. 3, Paragraph 1, Thomp. Dig., 462. Appeal and Supersedeas, 417.
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31. Chap. 2, Par. 1, Thomp. Dig., 234, Usury, 552.
32. Statutes regulating organization of grand jury, 562.
33. Sec. 74, Chap. 1096. An act to amend the pleading and practice in the courts of this State, amendment, 633.
34. Sec. 6, Par. 3, Thomp. Dig. 360. Process of courts of law, 636.

SUPERSEDEAS—

1. Under the statutes regulating appeals in chancery from final or interlocutory decrees a bond is not necessary to perfect an appeal. The only result attending a failure to give bond under the statute is, that the appeal does not operate as a supersedeas, 416.

2. Where an appeal is prosecuted from an interlocutory order or decree in chancery, under the act of 1853, if the bond is in a sufficient amount and so conditioned as to secure the appellee fully in his rights, as well as for all damages in the event the decree of the court below is affirmed, either in whole or in part, it is a sufficient bond upon which to award a supersedeas. *Kilbee & Barnes vs. Myrick*, 416.

SURETY—

A, B, and C, being partners, agree upon a dissolution; B and C assign and transfer all their interest in the joint property to A, who assumes the payment of the joint debts, and covenants to save B and C harmless.
Held:

1. That the property ceases by such agreement to be joint property, and that the lien or equity of the retiring partners to have a sale of the property, and an application to the joint debts, is destroyed, 315.

2. That as between C and A a relation analagous to that of principal and surety exists by virtue of A's assumption of the debts and his covenant, and that, saving the rights of the joint creditors, C has the standing of a surety in a court of equity, 315.

3. When the liability of a surety has attached in consequence of the default of the principal, the surety who has been sued by the creditor may apply to a court of equity and compel the principal to relieve him from his liability, 315.

4. Where the Chancellor has upon a bill filed by the surety in such a case, appointed a receiver to take charge of the old stock and such property as has been purchased by the proceeds of sales of what was once joint property, this court will not direct such order to be vacated unconditionally in a case where the principal debtor has transferred a portion of his money to another State, and is doing such acts as indicate an intention to disregard his covenant, and which if not checked will result in loss to the surety. Such an order should be vacated only on such terms as would secure the application of such property to the payment of the joint debts to the relief of the surety. *West & West vs. Chasten*, 315.

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SURPRISE—

1. Where the pleadings are regular, and the defendant's attention on crossing plaintiffs interrogatories for the examination of witnesses is called to the character of a draft upon the defendant, which draft is a proper cause of action in the case under an agreement of the parties, "not being advised of the particular character of the draft," under such circumstances, is no such matter of surprise as to authorize a new trial, 640.

2. If from a general review of the case there was evidence to justify the verdict, and it does not clearly appear that there have been errors in law or fact which necessarily operated to the prejudice of the defendant, a new trial will not be granted for surprise. *Orthing vs. Gundersheimer*, 640. TRIAL—See New Trial, Criminal Law, 25.

USURY—

The statute of usury, Th. Dig. 234, §1, refers to contracts of the loan of money or things of value for a specified interest or compensation for their use, *according to their value*; and such contracts as provide for a certain uncontingent repayment of the principal sum or value, and a certain uncontingent rate *in value* for its use; and unless a contract is in violation of this principle, it does not come within the prohibition of the statute. *Morrison vs. McKinnon*, 552.

VENIRE DE NOVO—See Jury.

WARRANTY—

1. The warranty contained in a bill of sale given for a negro, that he was to be "a slave for life," is not broken by the subsequent act of the Government, which abolished in the Southern States the institution of negro slavery. *Walker vs. Gatlin*, 1.

WRIT—See Process, Equity, 18.

WRIT OF ERROR—See Error.

This court having pronounced judgment of ouster against a person holding office under the State Constitution, such person not having been eligible when elected, the defendant obtains a writ of error from the Circuit Court of the U. S. to this court, returnable to the Supreme Court of the United States. The Chief Justice of this Court declines to sign the citation, giving his reason. *State of Florida vs. Gleason*, 271.

